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Rights of indigenous peoples

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Note by the Secretary-General

The Secretary-General has the honour to transmit the report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz, submitted in accordance with Human Rights Council resolution 27/13.

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Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples

Summary

The present report is submitted to the General Assembly by the Special Rapporteur on the rights of indigenous peoples pursuant to her mandate under Human Rights Council resolution 27/13. In the report, the Special Rapporteur provides a summary of her activities since her last report to the General Assembly. She dedicates the thematic section of the present report to an analysis of international investment agreements and investment clauses of free trade regimes and their impacts on the rights of indigenous peoples. She views the present report as the starting point for that issue, which she intends to be of continuing importance throughout the course of her mandate.

As a starting point for her ongoing work on international investment and free trade regimes, the report discusses a number of areas of concern, relating both to direct violations of the rights of indigenous peoples and the systemic impact of those regimes on their lives and communities.

The Special Rapporteur contends that investment clauses of free trade agreements and bilateral and multilateral investment treaties, as they are currently conceptualized and implemented, have actual and potential negative impacts on indigenous peoples' rights, in particular on their rights to self-determination; lands, territories and resources; participation; and free, prior and informed consent. That is not to suggest that investments are inherently destructive. Future studies will focus on how investment agreements can be equally beneficial for indigenous peoples and investors.

The present report highlights her analysis of the unjust elements of the prevailing system of global economic and financial governance and the constriction of the protective capacity of States and local governance systems. It discusses how indigenous peoples, as some of the most marginalized in the world, bear a disproportionate burden of a system that contains systemic imbalances between the enforcement of corporate investors' rights and human rights. The report concludes that both a more thorough review of implications of international investment and free trade agreements and deeper policy and systemic reforms are needed to ensure the respect, protection and fulfilment of indigenous peoples' rights.

I. Introduction

1. The present report is submitted to the General Assembly by the Special Rapporteur on the rights of indigenous peoples pursuant to her mandate under Council resolutions 15/14 and 24/9. In the report, the Special Rapporteur provides both a summary of her activities since her previous report to the Assembly (A/69/267) and a thematic analysis of international investment and free trade regimes and their impact on the rights of indigenous peoples.

2. The Special Rapporteur acknowledges with gratitude the assistance provided by the Office of the United Nations High Commissioner for Human Rights (OHCHR). She also expresses thanks to the many indigenous peoples, States, United Nations bodies and agencies and non-governmental organizations that cooperated with her over the past year in the implementation of her mandate.

II. Activities of the Special Rapporteur

A. Participation in international and national conferences and dialogues

3. As part of the fulfilment of her mandate, the Special Rapporteur has participated in a number of international and national dialogues and conferences, for example:

(a) The Special Rapporteur participated in the twentieth session of the Conference of Parties of the United Nations Framework Convention on Climate Change, held in Lima in December 2014, where she took part in the efforts to get human rights, particularly indigenous peoples rights, in the Lima Conference of the Parties' decisions. She held meetings with the Vice-Minister for Intercultural Affairs of Peru and several representatives of indigenous peoples from Peru and other countries;

(b) The Special Rapporteur coordinated closely with the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples, including reporting at the plenary sessions and holding parallel meetings with indigenous peoples and organizations during those sessions. While in Geneva and New York she also held direct dialogues with various Permanent Representatives to the United Nations of 10 Governments from Latin America, North America and the Pacific;

(c) During the fourteenth session of the Permanent Forum on Indigenous Peoples, held in April and May 2015, the Special Rapporteur shared her views on indigenous peoples' right to self-determined development and related economic, social and cultural rights and how they relate to the post-2015 development agenda;

(d) In January 2015, she participated in the international expert group meeting on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples. In February 2015 she did the same at the expert group meeting on cultural heritage and indigenous peoples' rights of the Expert Mechanism on the Rights of Indigenous Peoples;

(e) The Special Rapporteur was a panellist on the Human Rights Council high-level panel on human rights and climate change in March 2015;

(f) In April 2015, she took part in the World Bank Global Dialogue with indigenous peoples, where she made opening remarks and held meetings jointly with indigenous leaders and the president, executive directors and senior management of the World Bank;

(g) In July 2015, she delivered the keynote speech at the first session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights;

(h) In September 2015, she took part in the World Conference on Indigenous Peoples and spoke at a panel addressing coherence among the United Nations bodies, programmes, agencies and funds in relation to indigenous peoples' issues.

B. Country visits

4. Between 20 and 28 November 2014, the Special Rapporteur visited Paraguay. In her end-of-mission statement[1] she noted that the country had ratified all the core international and regional human rights standards, but observed a number of issues related to the violations of the rights of indigenous peoples. She observed that the foremost concern of indigenous peoples remains the security of their rights to lands, territories and resources. She discussed how Paraguay has experienced an exceptional rate of economic growth but how that had come at the expense of large-scale environmental destruction and some violations of indigenous peoples' rights and has not led to significant reductions in the poverty levels of indigenous peoples. She also commented on the lack of social services available to indigenous peoples as part the absence of the State within some indigenous communities, as well as significant barriers faced by indigenous peoples when seeking access to justice.

C. Report on the rights of indigenous women and girls

5. The Special Rapporteur reported to the thirtieth session of the Human Rights Council. Her thematic report (A/HRC/30/41) was on the rights of indigenous women and girls, where she highlighted how they suffer from a complex spectrum of mutually reinforcing and interconnected violations of their collective political, civil, and economic, social and cultural rights. Collectively, those rights violations constitute a form of structural violence against indigenous women and girls, which reinforces other forms of violence they commonly experience. She recognized the slight increase of attention to the rights of indigenous women and girls within some United Nations agencies and mechanisms and asserted that both a paradigm shift and a multidimensional approach is needed to improve the situation of women and girls. In the report, the Special Rapporteur made a series of recommendations to both Member States and United Nations organizations.

[1] Available from ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID= 15361&LangID=E.

III. International investment and free trade agreements

A. Background

6. The increase in foreign investment related to indigenous peoples' lands, waters and the extraction of natural resources such as minerals and metals, oil, gas and timber, among others, continues to be a matter of grave concern to the Special Rapporteur. It has compelled her to look more deeply into international investment regimes and how they interact with the respect or violation of the human rights of indigenous peoples. International investment treaties or agreements are instruments that primarily provide legal protection to foreign investors in relation to their investments in host States. Indeed, trade and financial liberalization have been central to many developing countries' economic development strategies and can create economic opportunities and growth. However, their impact on the human rights of citizens within countries hosting investment projects cannot be assumed to be exclusively or even predominantly positive.

7. The Special Rapporteur has become increasingly concerned about the actual and potential detrimental impacts of international investment and free trade agreements on the rights of indigenous peoples. While the present report aims to provide a general assessment of the key impact that those agreements have on indigenous peoples and the implementation of their rights under the United Nations Declaration on the Rights of Indigenous Peoples, she intends to dedicate ongoing attention to the subject throughout the remainder of her mandate. The following report will broadly frame the Special Rapporteur's concerns in relation to international investment agreements and treaties, and investment protection chapters of multilateral and regional free trade agreements, and set the framework for her ongoing work in the area. In that regard, the Special Rapporteur plans to send questionnaires to Member States and civil society organizations and organize a series of regional consultations to gain further insight into the issue.

8. In the development of the present report and her ongoing work in the area, the Special Rapporteur recognizes the work of other special procedures mandate-holders and United Nations mechanisms. The Special Rapporteur has consulted the report of the Independent Expert on the promotion of a democratic and equitable international order to the thirtieth session of the Human Rights Council (A/HRC/30/44) on the adverse human rights impacts of international investment agreements, bilateral investment treaties and multilateral free trade agreements on the international order. She is also aware of the upcoming report produced by the Independent Expert for the seventieth session of the General Assembly on the human rights implications of State-investor dispute settlement mechanisms.

9. The Special Rapporteur also consulted the report of the Special Rapporteur on the right to food to the Human Rights Council (A/HRC/19/59/Add.5), which provides guiding principles for Member States on ways to ensure that the trade and investment agreements they conclude are consistent with their obligations under international human rights instruments; and the report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to the sixty-ninth session of the General Assembly (A/69/299), which includes analysis of the impact of investment agreements on the right to

health. In addition, in 2015, 10 mandate holders expressed public concern about the impact of investment and free trade agreements on human rights.[2]

B. Overview of international investment and free trade agreements

10. International investment tends to be managed through treaty-based provisions within international law. There are a number of different mechanisms, known collectively as international investment agreements. International investment agreements are designed to protect foreign investors and their interests within States hosting investment projects. The three main types are:

(a) Bilateral investment treaties, which are signed between two States and focus on investment;

(b) Regional investment treaties that are signed between multiple countries within a region and also focus on investment;

(c) Provisions within multilateral and plurilateral trade and investment agreements which contain clauses on both investment and free trade, such as the North American Free Trade Agreement, the General Agreement on Trade in Services and the Energy Charter Treaty.

11. Those legal mechanisms, which constitute a primary source of public international law, first came into force in the late 1960s, before growing exponentially in the 1990s. At the end of 2014, there were 2,923 bilateral investment treaties and 345 other investment agreements in force, making the total number of international investment agreements 3,268.[3] The volume of bilateral investment treaties is decreasing, but the number of international investment agreements overall remains fairly stable owing to recent trends in investment provisions, equivalent to those commonly found within bilateral investment treaties, increasingly being included within broader free trade agreements. For example, the United States of America is concluding negotiations with countries from Asia for the Trans-Pacific Partnership Agreement, which includes investment features commonly found in bilateral investment treaties. The inclusion of investment management provisions within free trade agreements demonstrates the close links and shared neoliberal intellectual foundations of international investment and free trade.

12. The majority of investment treaties are negotiated between developing and developed countries. For example, 75 per cent of bilateral investment treaties are estimated to be between developing and developed countries.[4] However, the proportion of South-South investment agreements is growing. Developing countries enter into the agreements to open up their markets to foreign investors because of the expectation of jobs, investment and growth in gross domestic product (GDP).

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[2] Available from ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID= 16031&LangID=E.

[3] United Nations Conference on Trade and Development (UNCTAD), "IIA issues note: recent trends in IIAs and ISDs" IIA issues notes, No. 1 (February 2015). Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.

[4] Howard Mann, "International investment agreements, business and human rights: key issues and opportunities", prepared by the International Institute for Sustainable Development for John Ruggie, Special Representative of the Secretary-General on the issue of human rights, transnational corporations and other business enterprises, February 2008.

Such expectations are linked to dominant development paradigms, which identify foreign direct investment (FDI) and trade liberalization as strong drivers for GDP growth.

13. International investment agreements seek to provide substantive rights to investors that protect against expropriatory, unfair and discriminatory conduct by States hosting investment projects. While there is some variety among the agreements, international investment agreements often take a fairly standard format and many countries have model bilateral investment treaties that they use as a basis for negotiating such agreements. The standard terms within investment and free trade agreements include provisions relating to stabilization, expropriation, fair and equitable treatment and non-discriminatory treatment:

(a) Stabilization provisions are "choice of law" clauses that commonly stipulate which country's laws will govern the parameters of investment projects. The provisions also commonly including language indicating that any future changes in such laws cannot be retroactively applied in a way that disadvantages the investor;

(b) Expropriation clauses seek to limit the impact of Government agencies taking property for public purposes from foreign investment projects. Investor agreements tend to specify that any expropriation undertaken relating to investment projects must be in the public interest, non-discriminatory and compensated for at a market rate;

(c) Fair and equitable treatment clauses are a core part of investment agreements. They are broad provisions that have been interpreted to compel States to act "consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an even-handed manner, to ensure due process in decision-making and respect investors' legitimate expectations".[5] Fair and equal treatment clauses have, for example, been used to challenge taxation increases and Government attempts to regulate harmful products such as tobacco (see A/HRC30/44, paras. 25-27);

(d) Non-discriminatory treatment clauses specify that foreign investors from the home country should be guaranteed treatment that is equal to nationals from the host State and other third-party nationals.

14. Alongside the investor-State dispute settlement mechanisms, discussed below, the provisions collectively convey a strong set of rights to investors, which have significant and varied implications for indigenous rights and also affect the related protective capacities of States.

C. Investor-State dispute settlements

15. One significant feature of investment and free trade agreements are provisions which provide for the establishment of investor-State dispute settlement mechanisms. Those allow investors to challenge States for perceived violations of their rights under international investment agreements within binding arbitration mechanisms. There is a range of arbitral forums, each with their own rules,

[5] See *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (United Nations publication, Sales No. E.11.II.D.15).

available to investors, including the International Centre for Settlement of Investment Disputes, the United Nations Commission on International Trade Law (UNCITRAL), the Stockholm Chamber of Commerce and the International Chamber of Commerce.

16. Investors have direct access to such mechanisms with regard to any dispute that may arise within the context of international investment agreements, and, under provisions in international investment agreements, are not obligated to exhaust domestic remedies beforehand, thereby eliminating any form of judicial review. The non-judicial tribunals can award compensation to investors if the State is judged to have violated clauses in the investment treaty. There are no limitations on the financial awards that can be made. The United Nations Conference on Trade and Development (UNCTAD) reported that in 2014 a State was compelled to pay $50 billion to a corporation relating to three closely linked cases.[3] Such decisions cannot be appealed and are strictly binding upon States parties. Retroactive compound interest can be charged to States, at commercial rates, from the date of the measure that is being challenged within an investor-State dispute settlement case. It is reported that in one instance, a State party was instructed to pay $589 million in interest as part of a billion dollar award to a corporation.[6]

17. The majority of investor-State dispute settlement proceedings are bought against developing countries. Some 78 per cent of the known 608 investor-State dispute settlement claims bought against 101 countries have been against less developed countries. However, recent trends have shown that a growing proportion of investor-State dispute settlement cases are being brought against developed countries. In 2014, 40 per cent of new cases were against such States.[3] Cases against developed countries are predominantly brought by investors in other economically advanced countries, such as those in North America and the European Union.[7] As at the end of 2014, the most common States to be challenged in investor-State dispute settlement cases were Argentina, the Bolivarian Republic of Venezuela, the Czech Republic, Egypt, Canada, Mexico, Ecuador, India, Ukraine, Poland and the United States. While there is a mixture of developed and developing countries in that list, tribunal proceedings do not affect them equally. For example, the United States has used its legal and financial resources to fight investor-State dispute settlement cases, and it has never lost and been required to award compensation to an investor.[8]

18. Investors who brought investor-State dispute settlement cases in 2014 were predominantly from developed countries. The most common home States were the United States, the Netherlands, the United Kingdom of Great Britain and Northern Ireland, Germany, France, Canada, Italy, Spain, Switzerland, Turkey, Belgium and Austria. That follows long-term trends that show 80 per cent of claims are brought by investors from highly developed countries within North America and the European Union.[3]

19. The majority of recent investor-State dispute settlement proceedings have been brought under bilateral investment treaties; 30 of the known 42 cases in 2014 were

[6] Public Citizen, "Memorandum". Available from citizen.org/documents/oxy-v-ecuador-memo.pdf.

[7] UNCTAD, "IIA issues note: investor-State dispute settlement: an information note on the United States and the European Union", IIA issues notes, No. 2 (June 2014). Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d4_en.pdf.

[8] Congressional Research Service, "International investment agreements (IIAs): frequently asked questions", 15 May 2015. Available from http://fas.org/sgp/crs/misc/R44015.pdf.

brought under such treaties. Overall, however, the majority of investor-State dispute settlement cases have been brought under free trade agreements, with the North American Free Trade Agreement and the Energy Charter Treaty as the most frequently invoked standards.[3] Investors sometimes bring claims under both free trade agreements and bilateral investment treaties in situations where both are in place between the host and home States. In 2014, the most challenged State practices under investor-State dispute settlement proceedings were cancellations or alleged violations of contracts or concessions and revocations or denials of licences or permits. Other practices challenged include legislative reform, discrimination against foreign investors, water tariff regulation, measures relating to taxation and environmental issues.[3]

IV. International investment, free trade and the human rights of indigenous peoples

20. The impact of free trade and international investment agreements on human rights is broadly recognized as including issues such as land rights, environmental degradation, poverty, the State's regulatory and protective capacity, democratic deficit and challenges to the rule of law in relation to the development and enforcement of such agreements and the Government's ability to provide services such as health and water. Those issues have been recognized within the human rights and business agenda. The issue was discussed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, and is included within principle 9 of the Guiding Principles on Business and Human Rights. The principle articulates that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts".

21. The following section will look more specifically at both direct and systemic effects of investment and free trade regimes on the human rights of indigenous peoples. The two categories are deeply interrelated and mutually reinforcing, but it is valuable to look at them separately as it provides insight into the multilayered ways in which free trade and investment agreements and their enforcement, as described above, affect the human rights of indigenous peoples. Data about the impacts are limited owing to the complex, diffuse and opaque nature of such regimes. Therefore discussion of the issues of concern will summarize both available information and areas for further exploration by the Special Rapporteur during the implementation of her mandate.

A. Direct impacts on the rights of indigenous peoples

Rights to lands, territories and resources

22. A strong link to lands, territories and natural resources is a characteristic commonly associated with indigenous peoples. As outlined in, inter alia, articles 8, 25, 26, 29 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples, indigenous peoples have the right to the lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired, as well as the right to own, use, develop and control such resources. Article 1 of the

International Covenant on Civil and Political Rights, which establishes collective and individual rights to own property, complements the provisions within the Declaration.

23. Both non-discriminatory and expropriation clauses within investment and free trade agreements have significant potential to undermine the protection of indigenous peoples' land rights and the strongly associated cultural rights. Non-discriminatory clauses, as discussed above, entitle foreign investors to equal treatment to that afforded to nationals and other third parties. In practice, it means that if the rights of indigenous peoples are not explicitly included as exceptions to such provisions, then any special protections of their lands, either under customary law or even through specific indigenous land rights legislation, could be rendered obsolete in the context of investments.

24. Expropriation clauses within investment agreements also have the potential to be a significant barrier to indigenous land claims. If, in order to implement the Declaration and other human rights standards, host Governments with international investment agreements in place take positive measures to redistribute customary lands taken by foreign investors back to indigenous peoples, they could be required to provide compensation at commercial market rates. Investor-State dispute settlement tribunals have enforced that need for compensation at a market rate, even when land expropriation was for a legitimate public purpose or to redress an unjust appropriation of indigenous peoples' lands and territories.[9]

25. Moreover, the cost of reclaiming land in order to fulfil the rights of indigenous peoples may also be a barrier. States have historically faced challenges in finding the resources to pay for indigenous land. The application of the expropriation clauses within international investment agreements, without the mitigation of compensation, can only significantly increase those difficulties. Many governments, including local and indigenous governments, may simply not be able to afford the costs of reclaiming indigenous lands, even where they are protected, despite the provisions within the Declaration and other human rights treaties.

26. The complex tensions between the land and resource rights of indigenous peoples and the provisions of international investment agreements are exemplified by a number of cases, as discussed below.

27. In Ecuador, there has been a very long and complex legal dispute over environmental damage to indigenous land. Texaco, which became a subsidiary of Chevron in 2001, was accused of severe pollution of the rainforest and rivers between 1964 and 1992. Subsequently, two groups of indigenous peoples launched class action suits. In 2011, a judge ruled that Texaco/Chevron should pay $8.6 billion in damages or $18.6 billion if they failed to publically apologize. Texaco/Chevron has claimed the judgements are based on bribery and fraud and appealed the ruling in a number of Ecuadorian courts. During the ongoing legal processes, the damages increased to $18 billion. The Supreme Court of Ecuador upheld the judgement in 2012 but halved the increased damages to $9.51 billion.

[9] Margaret B. Devaney, "Remedies in investor-State arbitration: a public interest perspective", *Investment Treaty News* of the International Institute for Sustainable Development, vol. 3, No. 3 (March 2013). Available from iisd.org/sites/default/files/pdf/2013/iisd_itn_march_2013_en.pdf.

Texaco/Chevron has made several attempts to pursue damages under the bilateral agreement between the United States and Ecuador. Arbitration is ongoing.[10]

28. In 2007, the Government of Peru authorized a Canadian mining company, Bear Creek Mining Corporation, to operate the Santa Ana silver mine. Indigenous groups were concerned about the impact on Lake Titicaca and held a series of strikes and blockades. Following that action, and the deaths of six protestors when police fired on mostly indigenous protesters opposing the project, the Government was forced to repeal the mining company's authorization in 2011. At the same time, the Government gave local indigenous communities the power to approve or deny any mining or drilling operations in the area. The investor is now suing the Government of Peru under the investment chapter of the Canada-Peru free trade agreement and appears likely to claim expropriation of its investment. There are indications that the Government may allow the mine to restart to avoid a costly legal battle.[11]

29. Local indigenous peoples in the Plurinational State of Bolivia opposed a mining project in the area of the Mallku Khota because of its impact on sacred lagoons. Following strong social protest and recognition by the Government that the project violated a number of the provisions of the United Nations Declaration on Rights of Indigenous Peoples and the Indigenous and Tribal Peoples Convention (No. 169) of the International Labour Organization (ILO), the Government reversed the investor's concessions. The investor sued under the United Kingdom-Bolivia bilateral investment treaty, alleging a violation of the fair and equal treatment clauses and expropriation, among other provisions. The Government is trying to bring consideration of human rights, including the Declaration, into the investor-State dispute settlement case, including by claiming that the investor violated human rights, including those contained within the Declaration.[12]

30. Given the multitude of mining and petroleum projects, agribusiness investments, special economic zones, tourism developments and infrastructure projects taking place across almost all of the world's continents, often on indigenous lands, whether demarcated or not, conflicts between land rights and investment and free trade agreements are likely to become increasingly common. Indigenous peoples are vulnerable to experiencing a disproportionate burden of such conflicts, not only due to the frequency with which their lands are used for investment-related projects but also as a result of the additional loss of the cultural, non-economic benefits that indigenous people often derive from land.

Free, informed and prior consent

31. The right to free, informed and prior consent is included within the United Nations Declaration on the Rights of Indigenous Peoples and the right to consultation in ILO Convention No. 169. Despite those provisions, only

[10] Business & Human Rights Resource Centre, "Texaco/Chevron lawsuits (re Ecuador)". Available from http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador.

[11] International Centre for Settlement of Investment Disputes. "Bear Creek Mining Corporation v. Republic of Peru, ICSID case No. ARB/14/2". Available from italaw.com/cases/2848; Mitra Taj, "Peru hopes to revive Bear Creek mine, avoid legal battle", 15 August 2014. Available from http://in.reuters.com/article/2014/08/15/peru-bear-creek-minng-santaana-idINL2N0QL00Z 20140815.

[12] Permanent Court of Arbitration, "South American Silver Limited v. Bolivia, UNCITRAL, PCA case No. 2013-15", 2013-2015. Available from italaw.com/cases/2121.

representatives from national Governments negotiate, draft and agree on investment agreements, which are often conducted in strict privacy. The Special Rapporteur is not aware of representatives of indigenous peoples and/or officials from recognized indigenous self-governing structures being invited to participate in the formal negotiation and drafting of investment and free trade agreements that will have direct impacts on them. Given that such agreements are formally binding on all levels of government and that many investment projects have significant impact on indigenous peoples, that situation is, in and of itself, a violation of the rights to free, informed and prior consent, participation, consultation and self-determination.

32. The free, prior and informed consent of indigenous peoples has not been obtained in many projects funded by foreign investors within the framework of international investment agreements. Good faith consultations with indigenous peoples should be completed when undertaking all investment projects that directly affect them, as required by articles 19 and 32, paragraph 2, of the United Nations Declaration on the Rights of Indigenous Peoples and article 6, paragraph 2, of ILO Convention No. 169. The application of those articles to investment and free trade agreements provide opportunities to integrate the needs and perspectives of indigenous peoples into the provisions of the agreements, and prevent future abuses of their human rights. When such opportunities are lost, the chances for conflicts, discontinuation of projects and loss of profits increase.

33. The violations are exacerbated by the fact that there is the potential risk for financial liability for damages awarded against the State party to be passed on to indigenous governments. For example, some national Governments, including Canada and Mexico, have sought to reclaim the costs of damages awarded to corporations through withholding funds from local governments. In Mexico, a municipal government refused to give a permit for a toxic waste dump and the state government declared the area a special ecological zone. The Government of Mexico was subsequently sued by a United States investor under the North American Free Trade Agreement and required to pay $16 million.[13] The Government of Mexico attempted to withhold federal funds from the state-level authorities who had withheld the permit in an effort to force them to accept financial liability for the investor-State dispute settlement award. The state-level authorities challenged that and the Supreme Court of Mexico found that the national Government could not claim the damages back from the state-level authorities. While that case demonstrates that States cannot automatically pass the financial liability of investor-State dispute settlement awards to local authorities, there are other cases in which such agencies have had to pay damages relating to investment and free trade agreements. While the Special Rapporteur is not aware of any States passing on financial liability to autonomous indigenous governments, it is a potential issue of serious concern in relation to the right to free, informed and prior consent.

34. Violations of the right to free, informed and prior consent also have the potential to contribute to further abuses of the rights of indigenous peoples in the context of international investment and free trade agreements. Application of the principle of free, informed and prior consent to investment and free trade agreements provides an opportunity to integrate the needs and perspectives of indigenous peoples into the provisions of such agreements and investments and

[13] Public Citizen, "NAFTA chapter 11 investor-State cases: lessons for the Central America Free Trade Agreement", *Public Citizen's Global Trade Watch*, No. E9014 (February 2005).

prevent future abuses of their human rights. When such opportunities are lost, the potential preventive effect of respecting the right to free, informed and prior consent remains unfulfilled.

Cultural rights

35. There are a number of ways that the potential effects of investment and free trade agreements could undermine the cultural rights of indigenous peoples. First, the severe implications of investment and free trade agreements on the land and territorial rights of indigenous peoples are compounded by the cultural significance of indigenous lands and territories. As discussed above, links to land and waters are integral to indigenous culture and identity. Therefore, barriers to indigenous land ownership created by international investment agreements and free trade agreements are also an assault on the cultural rights of indigenous peoples. Furthermore, the displacement commonly caused by the loss of land and territory can further undermine the cultural integrity and protections of indigenous communities. Any undermining of indigenous self-governance mechanisms caused by international investment agreements and free trade agreements will also further degrade cultural rights protections.

36. Attempts by indigenous peoples to challenge harmful practices relating to cultural appropriation could also be compromised by the provisions of international investment agreements. One example is a legal challenge brought by indigenous peoples against the Washington Redskins football team regarding the harmful connotations of its name. Since then, six United States federal trademark registrations for the Washington Redskins have been cancelled. The decisions are still subject to appeal, with the sports team claiming large losses following its investment into the trademark. While the legal proceedings are not taking place within investor-State dispute settlement tribunals, that type of trademark cancellation could be challenged under international investment agreements if the trademark belonged to an investor from another country.

Self-determination, poverty and economic and social rights

37. As discussed above, indigenous peoples are not included in the negotiations and drafting of free trade agreements. However, the provisions of those agreements bind their self-governance arrangements and the use of their lands, territories and resources. For example, the United States model bilateral investment treaty is strictly binding on all levels of government, including political subdivisions and other entities that exercise regulatory, administrative or other governmental authority delegated by the national Government. Not having the ability to contribute to the drafting of powerful legal agreements that affect them is a violation of indigenous peoples' right to self-determination, as provided for in article 3 of the United Nations Declaration on the Rights of Indigenous Peoples, and the right to development. Article 32, paragraph 1, of the Declaration says that "indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories".

38. A specific effect of that imbalance in the role of indigenous governments and the denial of the rights to self-determination within the development of international investment agreements could be restrictions on the levying of taxes. A variety of types of taxation, including value added taxes, excise taxes on cigarettes, tax stamps

on cigarettes, corporate income taxes and natural resources taxes, have been challenged under the fair and equal treatment clauses in international investment agreements. A tax imposed only on non-indigenous people (which can include foreign investors) could violate national treatment provisions, for example the provisions within the United States bilateral investment treaty model.

39. The threats to the right to self-determination and self-governance posed by investment and free trade agreements compound long-standing and systemic violations of the rights of indigenous peoples. The violations have included gross and sustained assaults on the cultural integrity of indigenous peoples; the denigration and non-recognition of customary laws and governance systems; a failure to develop frameworks that allow indigenous peoples to exercise their right to development and self-governance; and practices that strip indigenous peoples of autonomy over their lands and natural resources. It is in that sense that international investment agreements are contributing to the perpetuation of colonial and post-colonial power structures that have caused the systematic racism and discrimination towards, and the marginalization and exploitation of, indigenous peoples.

40. Such unequal power relations between indigenous peoples and corporations and States also contribute to endemic levels of poverty among indigenous peoples. Indigenous peoples account for 5 per cent of the world's population, while representing 15 per cent of those living in poverty. As many as 33 per cent of all people living in extreme rural poverty globally are from indigenous communities. Those figures are particularly alarming given the wealth of natural resources that are located within indigenous territories. That degree of poverty is a violation of indigenous peoples' rights to development, as well as of their economic and social rights to an adequate standard of living, housing, food, water, health and education.

41. The violations of indigenous peoples' rights to self-determination and other economic and social rights are strongly linked to indigenous peoples' historical experiences of marginalization, dispossession from and environmental destruction of their ancestral lands and lack of self-determination over development pathways. The impacts of investment and free trade agreements exacerbate all of those factors. In addition, the systemic effects of such agreements, discussed below, also contribute to the causes of poverty and the denial of the right to self-determination among indigenous communities.

42. International investment agreements also have the potential to negatively affect the realization of a number of the economic and social rights of indigenous peoples. The costs borne by States in defending themselves in investor-State dispute settlement cases and in paying awards when defeated can be extremely high. That diverts public resources, which could limit the ability of States to invest in the realization of economic and social rights. International investment agreements can also drive and maintain the practice of privatizing public services and goods, including health care and water. For example, expropriation and fair and equal treatment clauses could make it prohibitively expensive for Governments to revoke private contracts for the provision of public health services. Given the private sector's poor track record of catering to the needs of the most marginalized and vulnerable, demonstrated, for example, by the privatization of water, the impact on the economic and social rights of indigenous peoples is significant.

43. In addition, as discussed in the upcoming report of the Independent Expert on the promotion of a democratic and equitable international order, investor-State

dispute settlement tribunals have been used to challenge measures to improve public health. As cited in the Independent Expert's report, in the Philip Morris (Switzerland) v. Uruguay (2010) case, the multinational tobacco company sued Uruguay under the Switzerland-Uruguay bilateral investment treaty claiming that the Uruguayan anti-smoking legislation devalued its investments. The same company also filed a claim against Australia for its efforts to curb tobacco. Public health issues, such as smoking, are currently increasing in indigenous communities, and the prevalence of such problems can be higher than in non-indigenous populations. Therefore, such investor-State dispute settlement claims have the potential to disproportionally affect indigenous peoples.

B. Systemic effects of investment and free trade regimes

44. International investment and free trade have a number of direct impacts on the human rights of indigenous peoples, as discussed above. While that is highly alarming in itself, it is also important to consider the systemic implications of the collective impact of such agreements and practices at the national and international levels. As some of the most historically marginalized groups within the international system, those systemic impacts strongly affect the human rights of indigenous peoples, who are already often highly vulnerable and bear a disproportionate burden of the overall effects of investment and free trade regimes.

Asymmetry between the State and private actors

45. International investment and free trade agreements confer upon foreign investors and transnational corporations very strong rights and enforcement mechanisms. However, the rules governing the responsibilities of private actors are often contained in so-called "soft" international law. The standards, which include a number of voluntary or non-binding standards or recommendations, fall short of legally binding instruments that allow for achieving balance in the rights and responsibilities of those actors. While investors are therefore able to access a strong and arguably disproportionate form of remedy, States and/or indigenous peoples are often unable to effectively legally challenge corporate practices that severely undermine the realization of human rights. That contributes to a dangerous accumulation of power among international corporate actors, which impedes States' abilities to act as an effective regulator and protector of human and indigenous peoples rights.

Constriction of the policy and legislative space of States

46. Provisions within international investment and free trade agreements can constrict the policy and legislative space in which Governments operate. That has been referred to in literature about international investment agreements as a "chilling effect" whereby the State becomes constrained in its ability to rule in the public interest owing to a wish to avoid sometimes billion-dollar arbitration and settlement costs. As described by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standards of physical and mental health, "international investment agreements and investor-State dispute settlement systems benefit transnational corporations at the cost of States' sovereign functions of legislation and adjudication" (see A/69/299, para. 4).

47. Fair and equal treatment and stabilization clauses have particular potential to constrain the capacity of Governments. For example, the fair and equal treatment requirements in the United States model bilateral investment treaty have been interpreted by some investment tribunals as paralyzing new laws and regulations. Arbitration judgements have upheld that new laws or regulations cannot be enforced if they are adverse to the foreign investor. Fair and equal treatment clauses have also been a very successful way for investors to sue Governments in disputes under trade and/or investment treaties. A high proportion of cases won by investors have invoked fair and equal treatment clauses. Some sources estimate that 81 per cent of cases won by investors cite fair and equal treatment violations.[14]

48. Concerns about that constriction of the policy and legislative space of Governments have a further direct impact on indigenous communities. The "chilling effect" of investment and free trade agreements could reduce the often already-low political will of States to take actions to fully implement the rights of indigenous peoples. For example, in 2010 in Guatemala, the Government suspended operations at the Marlin mine following protests from indigenous peoples and recommendations by the Inter-American Commission on Human Rights and ILO. However, press reports suggest that Government documents obtained through the freedom of information policy of Guatemala revealed that the State's fears that closing the mine down permanently could give rise to an investor-State dispute settlement case under its United States free trade agreement investment chapter played a role in allowing the mine to stay open.[15]

49. Concerns about the "chilling effect" have been expressed in the context of the new Trans-Pacific Partnership agreement between the United States, Canada and several Asia-Pacific countries. The Waitangi Tribunal is a body that was set up in 1975 in New Zealand to investigate grievances of the Maori against the Government of New Zealand. The tribunal established an urgent inquiry into the Government's actions in relation to negotiating the Trans-Pacific Partnership. A law professor asked to give evidence on the inquiry noted that the imposition of new conditions could have a negative impact on initiatives to protect indigenous rights. Potential scenarios she cited as breaching fair and equal treatment clauses in the Partnership could even include efforts to gain the prior consent of a local tribe before drilling, and the decision of a local board to refuse to issue a land-use licence after hearing evidence of Maori concerns.[16]

Loss of public funds

50. The "chilling effect" could be exacerbated by the practical impact of the loss of public funds during investor-State dispute settlement hearings and the costs of Governments defending themselves within tribunals. As described above, some tribunal awards can be valued at billions of dollars, and there are inevitable legal costs associated with fighting investor-State dispute settlement claims. Awards are binding and ultimately have to be paid with funds from taxpayers. The loss of public

[14] Public Citizen, "Memorandum", 5 September 2012. Available from citizen.org/documents/MST-Memo.pdf.

[15] Claire Provost and Matt Kennard, "The obscure legal system that lets corporations sue countries", *The Guardian*, 10 June 2015.

[16] New Zealand Ministry of Justice, "Affidavit of Professor Elizabeth Jane Kelsey", June 2015. Available from https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_92914254/Wai%202522%2C%20A0001.pdf.

funds to private actors on a large scale diminishes the amount of public funding available to broadly promote the public good, and human and indigenous rights more specifically.

51. The injustice of that is accentuated by the fact, discussed above, that historically the majority of countries who have been sued under investor-State dispute settlements are developing countries. As many indigenous peoples live in developing countries and are among the most marginalized within those States, they are highly vulnerable to the effects of the loss of public funds. That vulnerability is compounded by the specific risk, discussed above, of autonomous indigenous governments losing funding in the context of national Governments trying to recoup resources lost in investor-State dispute settlement hearings through withholding funding to local authorities, which can include tribal governments or other indigenous governing bodies.

Democratic deficit and weakened rule of law

52. The processes governing international investment and free trade agreements can be at odds with a human rights approach in many ways.

53. There is a lack of transparency, social dialogue and legislative oversight during the negotiation and drafting process of international investment agreements. Indigenous peoples and formal representatives are not commonly, if ever, included in negotiation and drafting processes despite the fact that the resulting agreements are legally binding upon their jurisdictions.

54. Judicial oversight in relation to international investment agreements is also extremely lacking, thereby undermining the rule of law. As discussed above, investors have direct access to investor-State dispute settlement mechanisms and do not have to exhaust national remedies first; therefore, judicial review of international investment agreements is completely circumvented. The absence of any judicial oversight raises many procedural concerns relating to how investor-State dispute settlements are implemented, including the lack of an appeals process, the diffuse nature of proceedings owing to the lack of any form of coordination and oversight body, the opacity of proceedings and the lack of comprehensive and publically available information about all rulings. In addition, there are serious concerns about bias and conflict of interest among legal professionals involved in cases. As stated by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, "the dispute settlement is controlled by a small clique of arbitrators and lawyers, and the same person may be counsel, arbitrator and adviser to an investor or State at different times. Many arbitrators share close links with business communities and may be inclined towards protecting investors' profits" (see A/69/299, para. 62).

55. Given the public interest and human rights concerns involved in international investment agreements and their enforcement, as well as the huge sums of public money sometimes at stake, the lack of legislative oversight and judicial review is indefensible. Practices that systematically undermine democratic principles and the rule of law progressively limit the ability of States and local authorities to protect human and indigenous rights.

Perpetuation of international power imbalances

56. Investment and free trade regimes can increase inequality between different countries, as imbalances inherent within international power structures can influence the negotiation and enforcement of such mechanisms. As discussed above, international trade and investment regimes more acutely affect developing countries. The majority of international investment agreements are between developing and developed countries; most investor-State dispute settlement cases have been brought against less developed countries, while investors are commonly from developed States.

57. The international investment regime for the protection of the rights of foreign investors has led to many disputes between investors and host States. The decisions and the strong enforcement mechanisms of such regimes can have dire consequences for the realization of human rights generally and indigenous peoples' rights in particular.

58. Questions have also been raised about whether international power structures have influenced the outcome of investor-State dispute settlement tribunals given that developed countries seem to be better able to insulate themselves from their negative impacts. For example, the United States has never lost an investor-State dispute settlement case. It is unclear if that is because developed countries are more able to access resources to defend themselves against cases or if there is a systemic bias favouring the most economically and geopolitically powerful countries.

59. By perpetuating the international power imbalances in the international system, free trade and investment regimes compound the related inequality in the resources available to countries. That lack of resources consequently negatively affects the capacities of less developed countries to protect the most vulnerable, including indigenous peoples.

Exclusive national economic growth

60. International investment and free trade can promote economic growth at the national level through the promotion of FDI and, it is hoped, by raising GDP. However, such economic growth is not often the type that facilitates poverty reduction amongst the most vulnerable citizens, including indigenous peoples. Rather, experience has shown that growth driven solely by trade liberalization, FDI, Government austerity and weak regulation exacerbates inequality and often comes at the cost of large-scale environmental destruction. Those negative secondary effects often undermine a broad range of indigenous peoples' rights, such as land rights, the right to self-determination over development pathways and the rights to health, food and an adequate standard of housing.

V. Key challenges and promising practices

A. Challenges

61. There are a number of closely related and mutually reinforcing challenges to achieving effective reform of international investment and free trade agreements and related improvements in the promotion and protection of indigenous peoples' human rights. Those challenges are discussed in the section below.

Dominance of neoliberalism and focus on extractive activities

62. The liberalization of international trade, the opening of markets to foreign investors and the development of international legal mechanisms have been strongly driven by neoliberal economic theory. Neoliberalism is an economic paradigm that champions the power of market forces and argues that, if left unregulated, markets will deliver global development. Neoliberalism grew in dominance in the latter part of the twentieth century and infiltrated many elements of development policy. Neoliberalism contains many tenets relating to international investment and free trade, including support for trade liberalization, the privatization of public services, a limited regulatory role for States and a link between increased FDI and growth in GDP.

63. Such tenets are consistent with, and therefore legitimize, the provisions of international investment and free trade agreements. Indeed, many leading international financial institutions endorse neoliberalism as a coherent economic theory that, if adhered to, will bring development to all. Yet that unquestioning discourse has obscured the vested interests and important human and indigenous rights implications of international investment and free trade regimes. It has contributed to a model of development that is measured by overall growth figures and gives little weight to whether that leads to a reduction in inequality or alleviates poverty, including among indigenous peoples. Moreover, the widespread and unquestioning endorsement of that economic theory, and its legitimization of free trade and investment agreements, can act as a barrier to cultivating the political will necessary for reform.

64. In parallel to neoliberalism, the development path many Governments have taken and continue to focus on is extractive activity. Extractive activity refers to economic activities focused on removing large quantities of natural resources to be used mainly for export. The natural resources being extracted include minerals, metals, oil and/or gas, water and products from forestry, farming and fishing. Many of the foreign investment projects that directly affect indigenous peoples include extractive activities. The competition between host States to attract foreign investment often leads to a race to the bottom in terms of social and environmental protection.

Lack of coherence within international law

65. International investment and free trade law regimes have been developed as a separate strand of international law from human and indigenous rights standards. Despite the strong public interest issues at stake within international investment agreements and the customary legal status of many human rights principles, there are no formal enforcement mechanisms to ensure that trade and investment agreements uphold human rights. Furthermore, as discussed above, the free trade and investment regime itself is diffuse, complex and opaque. There are many different arbitration mechanisms, rules and agreements, and a general lack of transparency. That undermines the abilities of policymakers and legislators to gain a systemic picture of international investment and free trade regimes and their effect on human and indigenous peoples' rights in order to develop effective options for reform.

Concerns about international competition

66. UNCTAD has identified States' concerns about international competition as a barrier to significant reform to free trade and investment regimes. States that are seen to prioritize the rights of indigenous peoples within their countries could therefore become less attractive for foreign investment, which could cause them to suffer in relation to the benefits that investment projects can bring.[17] Until the playing field is levelled among States, there are strong disincentives to enact significant reform. That highlights the importance of collective action on the issue of free trade and investment agreements and human rights.

B. Promising practices

67. While the Special Rapporteur believes that fundamental reform of the international management of corporate activities is necessary, she is also interested in how current mechanisms can be modified to achieve greater protection of the rights of indigenous groups. UNCTAD has noted that while almost all countries are parties to one or more international investment agreements, many are dissatisfied with the current regime and have concerns relating to the development impact of international investment agreements, the balance of rights and obligations of investors and States, investor-State dispute settlement mechanisms and the systemic complexity of the international investment agreement regime.[3] Those concerns among States present an opportunity for a collective forum on free trade and investment mechanisms. Current promising practices, illustrative examples of which are below, should be built upon to utilize the opportunity for positive change.

Exception clauses to protect the rights of indigenous peoples and promote sustainable development

68. Exception clauses have the potential to protect indigenous peoples from any adverse impacts on their rights in the context of international investment and free trade agreements. For example, indigenous land could be exempted from non-discrimination and expropriation clauses. Available information about exception clauses to protect the rights of indigenous peoples and their effectiveness is very limited and is an area that the Special Rapporteur plans to include in her ongoing engagement with Member States.

69. There have also been examples of clauses included in international investment agreements to promote sustainable development, which could be helpful in promoting the economic and social rights of indigenous peoples. A review by UNCTAD of the 13 international investment agreements concluded in 2014 for which texts are available (7 bilateral investment treaties and 6 other international investment agreements) showed that most of those recent treaties include sustainable development-oriented features. Of the agreements, 11 have general exceptions; for example, for the protection of human, animal or plant life or health, or for the conservation of exhaustible natural resources. Eleven treaties contain a clause that explicitly recognizes that the parties should not reduce health, safety or environmental standards in order to attract investment. Of those 11 treaties, 9 refer

[17] UNCTAD, "IIA issues note: reform of the IIA regime: four paths of action and a way forward", IIA issues notes, No. 3 (June 2014). Available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d6_en.pdf.

to the protection of health and safety, labour rights, the environment or sustainable development in the preamble.

70. Provisions that aim to more broadly preserve States' regulatory space and/or minimize exposure to investment arbitration supplement those sustainable development features. Provisions include clauses that exclude certain types of assets from the definition of investment, clarify State obligations under international investment agreements to narrow the scope of investor challenges, contain exceptions to transfer-of-funds obligations and more carefully regulate investor-State dispute settlement processes. Each of those types of provisions might be useful mechanisms for protecting the rights of indigenous peoples within the international investment agreement context.

Constitutional reform

71. There are examples of Latin American countries taking legal steps to protect themselves and their citizens from the impacts of international investment agreements. For example, as outlined by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Ecuador amended its Constitution to prohibit entry into instruments that waive its sovereign jurisdiction in the arbitration of disputes with private individuals or corporations. Ecuador, the Plurinational State of Bolivia and the Bolivarian Republic of Venezuela have also withdrawn from the Convention on the Settlement of Disputes between States and Nationals of Other States (see A/69/299, para. 70).

Multilateral efforts to increase transparency

72. There have been some important multilateral efforts recently to increase transparency within international free trade and investment regimes. They include the development and coming into force of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the adoption of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, which opened for signature in March of the present year.

VI. Conclusions and recommendations

A. Conclusions

73. **It is clear that international investment and free trade agreements have significant potential to contribute to violations of the rights of indigenous peoples. The threat posed by current regimes lies both in their direct impact on indigenous peoples rights and their contribution to systemic injustices and imbalances, which tend to disproportionally impact indigenous peoples as some of the most globally marginalized. For that reason the Special Rapporteur intends to dedicate ongoing attention to the issue during the fulfilment of the mandate.**

74. **The human and indigenous rights implications of international investment agreements constitute a complex and multifaceted issue that requires sustained and multilateral attention from United Nations Member States in close**

consultation with indigenous peoples and formal representatives. The Special Rapporteur believes that fundamental and systemic reform of the international management of investment and free trade is necessary within the context of broader efforts to address the human rights issues associated with business activities. The situation whereby companies and investors enjoy exceptionally strong rights and remedies while the only mechanisms available to hold them to account for any human and indigenous rights violations are voluntary and/or have a weak standing in international law cannot be allowed to continue. Furthermore, indigenous peoples continue to bear an unequal share of the burden that situation creates, and suffer from a spectrum of severe rights violations within the context of corporate activities and the related management of the globalized economy.

75. The need for wholesale and collective change is not, however, at odds with more immediate and incremental reform. The Special Rapporteur is also interested in the potential of emerging positive practices in relation to international investment agreements and believes that there are immediate steps States can take individually to better protect the rights of indigenous peoples.

76. More States are becoming increasingly dissatisfied with the injustices of free trade and investment regimes. At the same time, key stakeholders are become more fully sensitized to the deeply interrelated imbalances in the enforcement of corporate and human rights. Those trends provide an important opportunity to improve the protection and promotion of human and indigenous rights and to transform the international system of global economic management in such a way that it becomes significantly more just and equitable.

B. Recommendations

77. Concerning the reform of investment and free trade practices, the Special Rapporteur recommends that:

(a) Based on the principle of free, informed and prior consent, as set out in the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169, Member States explore, jointly with affected indigenous peoples, participatory mechanisms that will allow them to take part in or at least comment on the negotiation and drafting of all relevant investment and free trade agreements. That should be included as part of broader efforts to increase the level of social dialogue involved in the negotiation and drafting of such agreements;

(b) In addition to improving the level of social dialogue, the negotiation and drafting of international investment agreements be subject to parliamentary oversight and consultation with all levels of government. All indigenous self-governance structures should be formally included in decision-making relating to international investment agreements;

(c) In accordance with the guiding principles on human rights impact assessments of all trade and investment agreements developed by the Special Rapporteur on the right to food, States undertake robust human rights impact

assessments prior to signing all such treaties. Human rights assessments should routinely include specific consideration of the impact on the collective and individual rights of indigenous peoples developed through direct consultation with indigenous communities;

(d) Member States ensure that gender considerations are adequately integrated into the development of such human rights impact assessments and that its intersecting relationship with other sources of discrimination be analysed so that the specific vulnerability of indigenous women to the effects of investment practices is considered;

(e) Member States involve indigenous representatives, including women, in the negotiating process for all investment and free trade agreements when human rights impact assessments have identified potential issues relating to indigenous peoples;

(f) In consultation with indigenous peoples, Member States consider including exception clauses to protect the rights of indigenous peoples, including to ancestral land, related resources and autonomous government, within all relevant free trade and investment agreements;

(g) Member States ensure that references to the duties of both Governments and businesses to respect human rights, in accordance with the Guiding Principles on Business and Human Rights, are included in all new and renegotiated international investment agreements;

(h) For as long as investor-State dispute settlement tribunals take place, Member States routinely ensure that international human rights law, including all specific provisions on indigenous peoples, are used as a source of law in dispute arbitrations;

(i) Member States publish the results of all arbitration decisions made in investor-State dispute settlement cases, including any specific information on dimensions relating to the rights of indigenous peoples;

(j) Member States include analysis of the impact of investment and free trade agreements on indigenous peoples' rights and legal and policy responses in the development of national action plans on business and human rights and the implementation of the Guiding Principles on Business and Human Rights;

(k) Member States ratify the Convention on Transparency in Treaty-based Investor-State Arbitration, which opened for signature in March;

(l) Member States invest in targeted monitoring, research, and evaluation that develops understanding of the impact of international investment agreements on indigenous peoples and prepare reports on the effectiveness of policy and legal interventions to mitigate that impact.

78. Concerning deeper systemic reform, the Special Rapporteur recommends that Member States:

(a) Act collectively to consider ways to achieve better balance between investor and corporate rights and the human rights of all citizens within investment and free trade regimes;

(b) Participate actively in the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, established by the Human Rights Council in its resolution 29/6, to elaborate on a legally binding instrument and develop ways to strengthen legal accountability and remedy for corporate violations of human rights;

(c) In the context of the post-2015 development agenda, reconsider development paradigms that do not lead to sustainable and inclusive development and poverty reduction amongst all groups, including indigenous peoples, and ensure that the agency of indigenous peoples as development actors is recognized in the reconceptualization of economic development.

79. **The Special Rapporteur recommends that the United Nations and related organizations:**

(a) Provide any required technical support to Member States on immediate reform to investment and free trade agreements, as well as broader, longer-term systemic reform;

(b) Ensure the mainstreaming of human rights standards, including all those relating to indigenous peoples, within all United Nations and related agencies that work on issues relating to investment and free trade agreements, including UNCTAD, the World Trade Organization and the World Bank;

(c) Contribute to the base of evidence on the impact of investment and free trade agreements on the rights of indigenous peoples through targeted consultation and research;

(d) Take a leading role in coordinating Government efforts to increase transparency and oversight related to international investment agreements;

(e) Develop tools and guidance that Member States can use to ensure that protection for the rights of indigenous peoples is included within all investment and free trade agreements.

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Item 73 (a) of the provisional agenda*
Promotion and protection of human rights

Implementation of human rights instruments

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Chairs of the human rights treaty bodies on their twenty-seventh meeting, held in San José from 22 to 26 June 2015, pursuant to Assembly resolution 57/202.

* A/70/150.

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Report of the Chairs of the human rights treaty bodies on their twenty-seventh meeting

Summary

The General Assembly, in its resolution 57/202, requested the Secretary-General to submit to the Assembly the reports of the Chairs of the human rights treaty bodies on their periodic meetings, convened annually pursuant to Assembly resolution 49/178. The present document contains the report of the twenty-seventh meeting of the Chairs of the treaty bodies, which was held from 22 to 26 June 2015. The meeting convened in San José to bring the treaty body system closer to the level at which international human rights treaties and treaty body recommendations are implemented, to enhance the cooperation between the international and regional human rights protection systems and to engage with States, national human rights institutions and civil society in the Americas. The Chairs also considered the implementation of Assembly resolution 68/268 on strengthening and enhancing the effective functioning of the human rights treaty body system, as well as follow-up to the recommendations made at their twenty-sixth meeting. They further endorsed guidelines against intimidation or reprisals. The Chairs' decisions and recommendations are contained in section VII of the present report.

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I. Introduction

1. The twenty-seventh meeting of the Chairs of the human rights treaty bodies was held in San José from 22 to 26 June 2015. The meeting of Chairs is a forum for the Chairs of treaty bodies to maintain communication and dialogue with each other on common issues and problems, first called for by the General Assembly in 1983 in its resolution 38/117. The Assembly, in its resolution 57/202, requested the Secretary-General to submit to the Assembly the reports of the Chairs of the human rights treaty bodies on their periodic meetings. In its resolution 68/268, paragraph 38, the Assembly further encouraged the human rights treaty bodies, with a view to accelerating the harmonization of the treaty body system, to continue to enhance the role of their Chairs in relation to procedural matters, including with respect to formulating conclusions on issues related to working methods and procedural matters, promptly generalizing good practices and methodologies among all treaty bodies, ensuring coherence across the treaty bodies and standardizing working methods.

2. The Chairs' meetings, convened annually pursuant to General Assembly resolution 49/178, are usually held in Geneva. The objectives of holding meetings in the regions are (a) to bring the treaty body Chairs closer to the level at which the international human rights treaties and recommendations of the treaty bodies are implemented; (b) to strengthen cooperation, complementarity and synergies between international and regional human rights mechanisms, institutions and stakeholders; and (c) to enhance the accessibility and visibility of the treaty bodies, particularly through meetings with national human rights institutions and civil society organizations. Previously, Chairs' meetings have been organized in Brussels (2011) and Addis Ababa (2012).

3. The following official documents served as background for the meeting:

(a) Provisional agenda and annotations (HRI/MC/2015/1);

(b) Note by the Secretariat on implementation by treaty bodies of the conclusions and recommendations of the treaty body Chairpersons at their twenty-sixth meeting in the framework of General Assembly resolution 68/268 (HRI/MC/2015/2);

(c) Note by the Secretariat on reprisals in the context of United Nations human rights mechanisms (HRI/MC/2015/3);

(d) Note by the Secretariat on the consultation process for the elaboration of treaty body general comments (HRI/MC/2015/4);

(e) Note by the Secretariat on timely, late and non-reporting by States parties to the human rights treaty bodies (HRI/MC/2015/5).

4. The twenty-seventh annual meeting followed an informal consultation among the treaty body Chairs organized and hosted in January 2015 by the Chair of the twenty-sixth annual meeting, Malcolm Evans, in Wilton Park, United Kingdom of Great Britain and Northern Ireland. At that meeting, the Chairs adopted a joint statement on human rights and the post-2015 development agenda (see annex I) and a joint statement on human rights against violence (available from ohchr.org/EN/HRBodies/AnnualMeeting/Pages/MeetingChairpersons.aspx). At the twenty-seventh annual meeting, the Chairs had before them draft guidelines on

reprisals that were prepared upon their request and followed detailed guidance provided during the informal meeting of January 2015.

II. Organization of the meeting

5. The meeting was attended by the following Chairs: José Francisco Cali Tzay, Committee on the Elimination of Racial Discrimination; Waleed Sadi, Committee on Economic, Social and Cultural Rights; Fabian Salvioli, Human Rights Committee; Yoko Hayashi, Committee on the Elimination of Discrimination against Women; Benyam Dawit Mezmur, Committee on the Rights of the Child; Francisco Carrión Mena, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families; Claudio Grossman, Committee against Torture; Malcolm Evans, Subcommittee on Prevention of Torture; María Soledad Cisternas Reyes, Committee on the Rights of Persons with Disabilities; and Emmanuel Decaux, Committee on Enforced Disappearances.

6. The meeting commenced with a public opening ceremony during which the Minister for Foreign Affairs and Worship of Costa Rica, Manuel A. González Sanz, addressed the Chairs. The Chair of the Subcommittee on Prevention of Torture spoke in his capacity as Chair of the twenty-sixth meeting of treaty body Chairs. Other speakers at the opening ceremony included Mr. Grossman, in his capacity as President of the Inter-American Institute of Human Rights; Yoriko Yasukawa, United Nations Resident Coordinator in Costa Rica; Ambassador Yasmine Chatila Zwahlen of Switzerland, as host country of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the international human rights treaty body system; and Carmen Rosa Villa Quintana, Regional Representative for Central America of OHCHR.

7. Following the ceremony, Ibrahim Salama, Director of the Human Rights Treaties Division of OHCHR, thanked Mr. Evans, the Chair of the twenty-sixth annual meeting of Chairs, on behalf of the High Commissioner for his leadership over the past 12 months. He expressed the hope that the Chairs would again lead the way in ensuring adequate follow-up by the treaty bodies to General Assembly resolution 68/268.

8. Referring to the list of former Chairs and Vice Chairs of the Chairs' meetings provided to participants, the Director then proceeded with the election of officers. Based on the principle of rotation, Mr. Decaux, Chair of the Committee on Enforced Disappearances, was elected Chair-Rapporteur of the twenty-seventh meeting and Mr. Salvioli, Chair of the Human Rights Committee, was elected Vice-Chair, both by acclamation.

9. In his opening statement, the incoming Chair of the twenty-seventh meeting warmly thanked Mr. Grossman, President of the Inter-American Institute for Human Rights and Chair of the Committee against Torture, for inviting the annual meeting to the Americas, a region of pioneering human rights work and home to the Inter-American Commission and Court of Human Rights and to five treaty body Chairs. He also welcomed the four newly appointed Chairs to their first meeting of treaty body Chairs. He praised the outgoing Chair for having organized the informal consultation among Chairs in Wilton Park, United Kingdom, in January 2015. That meeting had allowed the Chairs to assess progress made by the treaty bodies in

following up on General Assembly resolution 68/268 and to prepare work for the guidelines against intimidation or reprisals.

10. The Chair then recalled how the Chairs' active involvement had influenced the outcome of the treaty body strengthening process in very concrete ways. The meeting of the Chairs of treaty bodies was not merely a matter of protocol, but constituted a strong aspect of synergy between the treaty bodies. As *primi inter pares*, the Chairs had endorsed important policy decisions, which had been taken up by the different treaty bodies, taking into account their own specificities and procedures. That coordination had become all the more necessary as the treaty body system had grown exponentially. Therefore, the Chair pledged to deepen the spirit of collective commitment and leadership that had characterized the Chairs' meetings in previous years.

11. Following the adoption of the provisional agenda and annotations (HRI/MC/2015/1) and the programme of work, the Chair of the twenty-sixth meeting made a brief statement.

12. Welcoming the treaty bodies' focus on immediate follow-up to General Assembly resolution 68/268, the Chair of the twenty-sixth meeting cautioned that the growth of the treaty body system, with more reports, individual communications and inquiries, would inevitably cause major challenges. That, and the 2020 review foreseen in resolution 68/268, called for a profound reflection by all on the future of the treaty body system. The Chair of the twenty-seventh meeting added that the treaty body system was in a dynamic period in which the meeting of Chairs should play a leading role to strengthen the coherence and effectiveness of the overall system, if only to anticipate the deadlines set by resolution 68/268.

III. Follow-up to General Assembly resolution 68/268 on strengthening and enhancing the effective functioning of the human rights treaty body system and to the conclusions and recommendations of the twenty-sixth meeting of Chairs

A. General discussion

13. The meeting had before it the note by the Secretariat on implementation by treaty bodies of the conclusions and recommendations of the treaty body chairpersons at their twenty-sixth meeting in the framework of General Assembly resolution 68/268 (HRI/MC/2015/2).

14. The Chair of the meeting recalled that, in its resolution 68/268, paragraph 38, the General Assembly encouraged the human rights treaty bodies, with a view to accelerating the harmonization of the treaty body system, to continue to enhance the role of their Chairs in relation to procedural matters, including with respect to formulating conclusions on issues related to working methods and procedural matters, promptly generalizing good practices and methodologies among all treaty bodies, ensuring coherence across the treaty bodies and standardizing working methods.

15. The Chairs discussed the impact of General Assembly resolution 68/268 on their respective treaty bodies and the follow-up by treaty bodies to

recommendations made by the Chairs at their twenty-sixth meeting regarding the simplified reporting procedure, the constructive dialogue and the concluding observations. Underscoring the importance of adequate and prompt follow-up by treaty bodies to resolution 68/268, the Chairs also noted that treaty bodies derived their legal basis and mandate directly from the human rights treaties and their States parties. Several Chairs underlined the importance of exchanging best practices with a view to reinforcing human rights law and the protection it offers to victims of human rights violations. Chairs also considered it important to increase the visibility of the treaty bodies and raise awareness among individual rights-holders regarding the work of the treaty bodies. Several Chairs also emphasized the importance of civil society involvement in the work of the treaty bodies and the need to pay greater attention to civil society concerns about the functioning of the treaty bodies. In that regard, treaty bodies had a responsibility to work together as a system, rather than in isolation from one another. Several Chairs emphasized that the Chairs of treaty bodies play a key role in fostering more coordination and that it by no means called into question the independence of each treaty body.

B. Update on the guidelines on the independence and impartiality of members of the human rights treaty bodies (Addis Ababa guidelines)

16. At their twenty-fourth annual meeting in June 2012, the Chairs endorsed the guidelines on the independence and impartiality of members of the human rights treaty bodies (Addis Ababa guidelines) (A/67/222 and Corr.1, annex I) and strongly recommended that they be promptly adopted by their respective treaty bodies. Several Chairs recalled how the Chairs' proactive approach to the topic had positively influenced the outcome of the treaty body strengthening process and led to the recognition of the Addis Ababa guidelines by the General Assembly in resolution 68/268.

17. The Chair of the twenty-seventh meeting recalled that, in that resolution, the General Assembly had encouraged the treaty bodies to implement the Addis Ababa guidelines in accordance with their mandates and invited the Chairs to keep States parties updated on their implementation. Also, the progress report of the Secretary-General mandated in resolution 68/268 would include information on the adoption and implementation of the Addis Ababa guidelines by the treaty bodies. The Chair of the meeting therefore underscored the importance of comparing experiences and taking stock of the operationalization of the Addis Ababa guidelines. All treaty bodies were requested by OHCHR to submit a report on actions taken to adopt and operationalize the Addis Ababa guidelines, for inclusion in the progress report of the Secretary-General to be submitted to the Assembly in 2016.

18. The Chairs shared the experiences of the respective treaty bodies in implementing the Addis Ababa guidelines, which showed that practices diverged considerably, in particular those practices relating to the participation of treaty body members in the constructive dialogue, the adoption of concluding observations and the deliberations on individual communications pertaining to their country of nationality or residence.

19. There was broad agreement among the Chairs that the Addis Ababa guidelines greatly improved the effective functioning of treaty bodies. Several Chairs stressed the importance of avoiding even the appearance of treaty body members not acting

in full independence and impartiality. They considered the principle of non-participation of nationals in the review of their own country or countries of nationality or residence a good practice in order to dispel any appearance of treaty bodies not acting independently and impartially, and stressed the importance of applying the principle consistently.

20. Several Chairs also pointed to the ultimate responsibility of States parties in ensuring the independence and impartiality of treaty body members at the level of treaty body members' nomination and election by States parties.

C. Consultation process for the elaboration of treaty body general comments

21. The meeting had before it the note by the Secretariat on the consultation process for the elaboration of treaty body general comments (HRI/MC/2015/4). Specific reference was made by the Chair of the meeting to the comparative analysis of existing practices as well as the suggested elements, for consideration by the Chairs, for a common methodology for the consultation process.

22. The General Assembly, in its resolution 68/268, paragraph 14, encouraged the treaty bodies to develop an aligned consultation process for the elaboration of general comments, and the Chairs, at their twenty-sixth meeting, had decided to include that item in the agenda of the twenty-seventh meeting. The item was considered by the Chairs on 24 and 26 June 2015.

23. The Chairs acknowledged that consultation was indispensable for the transparency, legitimacy and publicity of general comments. The importance of posting draft general comments on the OHCHR website and of consulting States parties, other treaty bodies, relevant special procedures, United Nations agencies and other stakeholders was emphasized. The Chairs agreed that, while comments received should be taken into account, the final responsibility for the content of general comments rested with the treaty body.

24. Several Chairs also recalled that, without losing legal precision, general comments should be user-friendly, concise and precise. Concern was also expressed over the capacity of OHCHR to support the drafting and consultation processes for up to four general comments at the same time in some treaty bodies. A brief, inconclusive discussion also took place on the possibility of harmonizing the use of the term "general comments", as two committees continue to use the term "general recommendations".

25. The Chairs endorsed a common methodology for consultation, which is reflected in the decisions and recommendations of the present report, and recommended it for generalization among all treaty bodies in the preparation of general comments.

D. Reporting compliance by States parties

26. The meeting had before it the note by the Secretariat on timely, late and non-reporting by States parties to the human rights treaty bodies (HRI/MC/2015/5).

27. At their twenty-fifth meeting, the Chairs had expressed concern about delays and the non-submission of a number of States party reports to treaty bodies, and decided to include the topic as a standing item on the agenda of the annual meeting of Chairs.

28. It was noted that the issue of late reporting and non-reporting by States parties gravely undermined the effectiveness of the treaty body system. In that regard, several Chairs reported on the practice of their treaty bodies of examining States parties in the absence of a report, in instances in which reports were long overdue. They agreed that the experience of introducing the practice was very positive. Upon being notified that they would be examined even without report, a number of States parties had requested an extension of the deadline and submitted a report. The States that failed to do that would usually send a delegation to participate in the constructive dialogue. Instances in which States parties had been reviewed entirely in absentia had therefore occurred only very rarely or, for some treaty bodies, not at all.

29. The Chairs welcomed the reflection of States parties' compliance with reporting obligations on the OHCHR website (see http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx) and requested OHCHR to continue to update that information. They further decided to hold an in-depth discussion on reporting compliance by States parties at their next meeting.

E. Briefing on the treaty body capacity-building programme of the Office of the United Nations High Commissioner for Human Rights

30. As requested during the twenty-sixth meeting of Chairs, the Chief of the Capacity-Building and Harmonization Section of OHCHR briefed the meeting on the capacity-building programme established pursuant to General Assembly resolution 68/268, paragraphs 17 to 20.

31. The programme was launched in January 2015 with the following components:

(a) Direct assistance to States requesting assistance with the establishment or strengthening of national mechanisms for reporting and follow-up;

(b) The deployment of capacity-building officers in OHCHR regional offices to reinforce existing efforts to develop State capacity to prepare reports to treaty bodies;

(c) Subregional training-of-trainers for State officials, so as to ensure the broadest possible impact of capacity-building measures;

(d) The development of a roster of trainers;

(e) The development of training and information tools on engagement with treaty bodies and the upkeep of the Universal Human Rights Index and the database of treaty body documents.

32. While seeking to provide universal coverage, the programme would prioritize States parties with a record of non-reporting or late reporting, as well as States parties that planned to establish or enhance national standing mechanisms for reporting and follow-up.

33. The Chairs expressed appreciation for the update on the treaty body capacity-building programme of OHCHR. The Chair of the Subcommittee on Prevention of Torture relayed the wish of Subcommittee members that their treaty body's specific capacity-building responsibility under the Optional Protocol to the Convention against Torture, namely to advise and assist national preventive mechanisms, would also be covered by the capacity-building programme.

F. Reprisals

34. At their twenty-sixth meeting, the Chairs decided to develop and to adopt, at their twenty-seventh meeting, a joint treaty body policy against reprisals (see A/69/285, paragraph 111). The meeting had before it the note by the Secretariat on reprisals in the context of United Nations human rights mechanisms (HRI/MC/2015/3). In addition, the Chairs considered the draft guidelines on reprisals prepared at their request.

35. It was on the basis of that request and the guidance provided during the informal meeting of the Chairs in January 2015 in the United Kingdom that the draft guidelines on reprisals had been prepared and provided to the Chairs seven weeks in advance, to allow time for intersessional consultations in all treaty bodies. The Chair of the meeting recalled that reprisals were a major challenge for the treaty body system as a whole and that the Chairs had advocated for the issue of reprisals to be included in General Assembly resolution 68/268. The next step for the Chairs was to translate that condemnation of reprisals into operational practice by endorsing the San José guidelines and encouraging each treaty body to adopt them.

36. Each Chair gave an overview of the discussions in her or his respective committee on the topic, and most Chairs were also in a position to convey comments on the draft guidelines. During the subsequent discussion, several Chairs noted that the obligation State parties assumed in order to cooperate with treaty bodies precluded them from engaging in intimidation or reprisals against persons seeking to cooperate, cooperating or having cooperated with the treaty bodies. Some human rights instruments explicitly recognized that obligation.[1] There was also widespread recognition that treaty bodies had a moral, if not a legal, responsibility to address that concern and that a failure to do so could deprive treaty bodies of the cooperation of victims and civil society interlocutors.

37. Several Chairs recounted examples of reprisals against people who had cooperated with treaty bodies and other United Nations human rights mechanisms, including extrajudicial killings, torture and incommunicado arbitrary detention. The Chairs agreed that reprisals could take many forms. For instance, human rights defenders could be publicly branded as traitors by senior officials or have harmful aspersions cast on them in other ways. Intimidating people to prevent them from engaging with the treaty bodies in the first place was also a real concern. Moreover,

[1] Including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Optional Protocol to the Convention against Torture; the International Convention for the Protection of All Persons from Enforced Disappearance; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

it was noted that the nature of reprisals could evolve over time and differ between treaty bodies given the various types of stakeholders cooperating with them. That made it very difficult, several Chairs felt, to establish definitions of intimidation and reprisals that comprehensively anticipated all relevant concerns that could arise.

38. Several Chairs also noted that threats could not only emanate from States parties but also from non-state actors. One chair referred to the example of detainees being intimidated by fellow detainees. Another mentioned the private sector as a potential source of reprisals and intimidation. The Chairs underscored that States also have a duty to protect those who face threats from non-state actors with due diligence.

39. It was noted that most treaty bodies had already started to put in place measures to address intimidation and reprisals. With the exception of the Committee on the Elimination of Discrimination against Women and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, all treaty bodies had appointed one or more rapporteurs or a focal point on reprisals.

40. It was noted that action by treaty bodies should comprise both prevention and follow-up when intimidation and reprisals occurred. Noting also feedback received from national human rights institutions and civil society organizations, several Chairs recognized that intimidation and reprisals required an immediate response from the body concerned, in addition to coordinated action with other human rights mechanisms.

41. The Chairs unanimously endorsed the guidelines against intimidation and reprisals (San José guidelines),[2] and recommended their adoption by all treaty bodies. They also reaffirmed their previous decision to maintain intimidation and reprisals as a standing item on the agenda of their annual meeting.

G. Post-2015 development agenda

42. Under the agenda item, the Chairs adopted a joint statement on human rights and the post-2015 development agenda (see annex I), which they requested OHCHR to disseminate to intergovernmental forums and relevant stakeholders.

IV. Human rights panel

43. On 23 June 2015, the Chairs participated in a human rights panel organized by the Inter-American Institute for Human Rights. The first segment, on the relationship between the Inter-American and United Nations human rights systems, was moderated by Elizabeth Odio Benito, judge-elect of the Inter-American Court of Human Rights. In his presentation, Mr. Salvioli, Chair of the Human Rights Committee, called for greater cooperation between the Inter-American organs and international human rights treaty bodies, notably with regard to the harmonization of jurisprudence. James Cavallaro, Commissioner of the Inter-American Commission on Human Rights, focused on new thematic work and methodological approaches of the Inter-American Commission of Human Rights. He underscored the positive outcomes of on-site visits and the amicable settlement of cases. He

[2] HRI/MC/2015/6, English only.

informed the panel that, in its legal determinations, the Inter-American Commission frequently drew on the work of the international human rights mechanisms and in particular the work of the treaty bodies. María Soledad Cisternas Reyes, Chair of the Committee on the Rights of Persons with Disabilities, spoke about the role of public policies and legislation in the implementation of human rights treaties, focusing on temporary special measures for persons and groups facing discrimination.

44. Mr. Grossman, Chair of the Committee against Torture, underscored that cooperation between the Inter-American and international human rights systems was a necessity and maximized efficiency with limited resources, and stressed the complementarity of both systems. For instance, the treaty bodies could weigh in on concerns relating to larger public policies through the State party reporting procedure. Its individual communications procedure could also be faster than recourse to the Inter-American system. Humberto Sierra, President of the Inter-American Court of Human Rights, noted recent developments in the jurisprudence and methodology of the Inter-American Court and their potential relevance to other human rights bodies. He referred to the Court's work on the human rights of migrants and indigenous peoples and its use of on-site visits. The Inter-American Court was also engaging with constitutional courts in the region to give further impetus to a judicial "conventionality" review at the national level (i.e., an assessment of the compliance of national decisions or measures with the American Convention on Human Rights).

45. The second segment of the panel was dedicated to the topic of reprisals against human rights defenders and was chaired by Joseph Thompson, Executive Director of the Inter-American Institute for Human Rights. Mr. Evans, Chair of the Subcommittee on Prevention of Torture, noted the difficulty in identifying effective measures to respond to reprisals beyond public condemnation. Further thought needed to be given to how to address the culture of intimidation that existed in some countries, how to deal with threats emanating from non-state actors and how to protect groups facing particular risks.

46. Elizabeth Abi-Mershed, Deputy Executive Secretary of the Inter-American Commission of Human Rights, gave an overview of the precautionary measures that the Inter-American Commission and the Inter-American Court had put in place to prevent and respond to reprisals. She noted that many cases of reprisals and intimidation found by the Inter-American mechanisms were directed against social leaders, journalists and human rights defenders, including justice operators.

47. Viviana Krsticevic of the Center for Justice and International Law noted that human rights defenders face a diverse range of reprisals including murder, kidnapping, enforced disappearance, hacking of websites, expulsion from the country concerned and criminalization of their activities. She called on human rights mechanisms to respond swiftly to reprisals, through preventive measures, clear policies, the establishment of rapporteurs on reprisals, coordinated responses between different mechanisms and by generally providing human rights defenders with more visibility, for example through the webcasting of proceedings. International bodies should also ask States to diligently investigate reprisals by State and non-state actors. She called on the treaty bodies to take concrete action, otherwise human rights defenders would stop engaging with them.

48. Agnes Callamard of Columbia University placed the problem of reprisals against human rights defenders in the wider context of shrinking civic space and freedom of expression. Research undertaken showed an ongoing deterioration of freedom of expression as national security discourses dominated the national agenda in many countries. She observed that reprisals not only broke the bond of trust between people and the United Nations, but also severed the bond between States and the United Nations.

49. Montserrat Solano, Ombudswoman of Costa Rica, underscored that human rights defenders had to be able to file complaints against reprisals both at the national and international levels and that national human rights institutions had an important role in responding to reprisals at the national level. At times, she noted, national human rights institutions were themselves subject to reprisals and intimidation.

V. Consultations in Costa Rica

A. Consultations with national authorities and human rights structures

50. On 22 June 2015, the Chairs were received by President Luis Guillermo Solís of Costa Rica for an informal discussion. The President underlined the commitment of Costa Rica to fully cooperate with the treaty bodies and implement their recommendations. In the dialogue that followed, he encouraged the treaty bodies to swiftly implement General Assembly resolution 68/268 and expressed the country's support for a review of the state of the treaty body system and the effectiveness of all measures contained in the resolution in 2020, as mandated by the same resolution.

51. On 23 June 2015, the Chairs held a working meeting with Vice-President Ana Helena Chacón Echeverría of Costa Rica, members of the cabinet, parliamentarians, judges and members of the national mechanism for reporting to treaty bodies. State participants raised a number of issues, including discrimination against minorities, indigenous peoples and persons with disabilities; the rule of law; and the implementation of economic and social rights. Each Chair explained the working methods and priorities of her or his respective treaty body and gave examples of how States could make use of treaty bodies' work.

52. On 26 June 2015, the Chairs had a working meeting with a delegation of members of the Human Rights Commission of the Legislative Assembly of Costa Rica. They discussed issues emerging from recent treaty bodies dialogues with Costa Rica, and the Chairs appreciated being provided with information on the follow-up by Parliament to various recommendations. Matters discussed included the human rights situation of Afro-descendants, indigenous peoples, migrants, children and persons with disabilities; sexual and reproductive rights; human trafficking; and the national preventive mechanism against torture. Parliamentarians considered it important to institutionalize national structures to systematically follow up on treaty body recommendations.

B. Consultations with the Inter-American human rights mechanisms

53. The Chairs held closed meetings with the Inter-American human rights mechanisms with a view to enhancing synergies between international and regional human rights mechanisms and institutions. In separate meetings, they met with the full bench of the Inter-American Court of Human Rights as well as with Commissioners and the secretariat of the Inter-American Commission on Human Rights.

54. The meetings covered, inter alia, the following topics: the value of exchanging good practices in the area of methods of work; sharing jurisprudence and analysis; maximizing the impact of the decisions and recommendations of both systems; identifying opportunities to work together on thematic areas such as women, children, migrants, persons with disabilities and persons deprived of their liberty, racial discrimination, enforced disappearances and reprisals; considering mutually inviting members of the organs and secretariats to each other's meetings; and using technological advancement to deepen relations between the two systems, such as videoconferencing. The treaty body Chairs expressed their satisfaction and recognition to the Court and the Commission for the fruitful dialogue as well as their commitment to deepening relations with regional bodies of the various regional human rights protection systems around the world.

55. The proposals formulated and submitted by the Chairs to the Inter-American Commission on Human Rights to enhance the cooperation between the international human rights treaty bodies with the Inter-American Commission on Human rights are contained in annex II of the present report.

C. Dialogue with the diplomatic community in San José

56. On 22 June 2015, the Chairs met representatives of the diplomatic community at the Ministry of Foreign Affairs and Worship of Costa Rica. The Minister for Foreign Affairs and Worship of Costa Rica, Mr. González Sanz, highlighted that the dialogue between States and the international human rights treaty bodies was a strategic one that ought to be strengthened. As the international community commemorated the seventieth anniversary of the founding of the United Nations, it had a responsibility to discuss the future of the United Nations and its institutional framework in order to ensure that the Organization became increasingly relevant to the new challenges facing humanity. In that context, Costa Rica called to re-size and strengthen the human rights pillar of the United Nations. The vision of Costa Rica was to simultaneously enhance both the normative dimension and the institutional dimension of that third pillar: on the one hand, to strengthen the treaty body system and, on the other hand, to improve the working methods of the Human Rights Council and strengthen OHCHR. Likewise, the international community had to address the striking imbalance in the allocation of financial resources to the three pillars.

57. The Minister underlined that the objective of universal treaty ratification and reporting posed a challenge to the international human rights treaty bodies and that, paradoxically, non-compliance by States with their reporting obligations had saved the treaty body system from collapse. The Minister recognized the difficulties faced by the treaty bodies in meeting their increasing workload, despite the significant

efforts made to improve efficiency. To a large extent, the current situation was the result of the recognition by States parties of the importance and usefulness of the work of the treaty bodies. For that reason, strengthening the treaty body system was a constant task and a strategic need. In his statement, the Minister expressed the need to find solutions that addressed the challenges without weakening the human rights mechanisms.

58. The Minister further called upon the treaty body Chairs to align working methods and called upon the treaty bodies to harmonize jurisprudence so as to avoid duplications and contradictions that would complicate the work of governments in implementing treaty body output. Treaty body recommendations, he said, should also be stated in terms that considered the time horizon so that they could be translated into national planning processes and the development of public policies.

59. The Minister underlined that the task of strengthening the system was monumental, at a time when all parties were fully preoccupied with the implementation and follow-up to General Assembly resolution 68/268. He recalled that resolution 68/268 mandated a review of the state of the treaty body system to be undertaken no later than 2020. The 2020 review offered a unique opportunity to complete unfinished business and to make the system more sustainable at national and international levels, on the basis of the progress reports that would be prepared by the Secretary-General between now and then.

60. The Minister expressed the view that innovation, fresh ideas and innovative proposals were needed in the run-up to the 2020 review. He called upon academia to provide sober reflection, new approaches and innovative inputs to the review. They should consider all options for the reform of the treaty body system, including by analysing prior ideas that had not been pursued and adapting them to the new context. He called upon internationally renowned academic institutions from all regions of the world to join efforts to develop a reflection process that would feed into the work of decision-makers and would allow them to expand their horizons in the lead-up to the 2020 review. The goal of the "San José" process should be to revamp the treaty body system as one of the greatest achievements of the international community for harmonious coexistence and peacebuilding, as well as to strengthen the human rights pillar of the United Nations.

61. Representatives of Argentina, Chile, China, Colombia, Ecuador, Mexico, Panama, Paraguay, Switzerland, the Russian Federation and the Bolivarian Republic of Venezuela also took the floor.

62. Several State representatives urged the treaty bodies to follow up on General Assembly resolution 268/68, which had been adopted by consensus and called for greater harmonization, transparency and simplification in the working methods of the treaty bodies and for better cooperation between the international and regional human rights mechanisms. Some speakers warned that treaty bodies should not create new legal obligations through general comments or follow-up procedures.

63. Several speakers also urged treaty bodies to issue shorter, more pertinent, realistic and precise recommendations that related to their respective treaties and that built on previous concluding observations. They also emphasized that the dialogue between States parties and treaty bodies should be more interactive. Several speakers also stressed the need for better coordination among treaty bodies

to avoid duplication and sometimes contradictory recommendations on the same subject.

64. One State representative, highlighting the reporting challenge for national administrations, called for the creation of a comprehensive reporting calendar. Some States representatives also highlighted the need for the United Nations system as a whole to better support States in the implementation of treaty body recommendations.

65. Several States parties provided information on the national reporting and follow-up mechanism their countries had put in place. In response to those presentations, the Chairs considered that national reporting and follow-up mechanisms were a good practice that other States parties should also introduce.

66. The Chairs expressed their commitment and that of the treaty bodies to following up on General Assembly resolution 68/268. They reminded States that the election and selection of independent and impartial experts was a fundamental prerequisite for the effective functioning of the international human rights treaty bodies.

D. Consultation with national human rights institutions

67. On 24 June, the Chairs met with representatives of the national human rights institutions of Costa Rica, El Salvador, Honduras, Nicaragua and Panama. The Ombudswoman of Costa Rica delivered a statement on behalf of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, representing a global association of more than 100 national human rights institutions. In her statement, she conveyed the recommendation that the treaty bodies develop a coherent and harmonized approach for the engagement of national human rights institutions with the treaty body system in order to ensure their effective participation and build on good practices developed.

68. The Coordinating Committee representative further recommended that the treaty bodies develop a common approach to address and respond to the issue of reprisals, noting that it was concerned by reported acts of reprisals or acts of intimidation against people cooperating with the international human rights mechanisms, including members and staff of national human rights institutions. One representative noted in that respect that reprisals could take subtle forms, such as budget cuts for national human rights institutions or their exclusion from key discussions.

69. The Coordinating Committee representative also focused on the new global agenda for sustainable development, which, once agreed upon by Member States, could greatly enhance the protection and enjoyment of human rights. The Coordinating Committee representative encouraged the treaty bodies to include the achievement of relevant sustainable development goals and targets as a routine component of the State party review. National human rights institutions stood ready to work with multilateral and national agencies to develop and apply global and national indicators to measure progress and provide the treaty bodies with that information.

70. A statement was also delivered by the National Commissioner for Human Rights of Honduras on behalf of the Central American Council of national human

rights institutions. In his statement, he emphasized that, for the national human rights institutions of the subregion, the right to development should be at the heart of the post-2015 development agenda. A representative of each of the national human rights institutions then briefed the treaty body Chairs on priorities and major campaigns for the protection and promotion of human rights.

71. In the ensuing discussion with the Chairs, the following issues were addressed: the *locus standi* (commonly translated as the right to bring an action) before the treaty bodies when there was more than one national human rights institution in a country, particularly in federal States, or the status of specialized bodies not recognized as national human rights institutions under the Paris Principles; the role of national human rights institutions in advocating for the acceptance by States of individual complaint procedures; the possibility of national human rights institutions submitting cases to the treaty bodies; the possibility of national human rights institutions hosting civil society and the broader public for the webcast of treaty bodies' constructive dialogues with the State party; and the role of national human rights institutions in disseminating concluding observations and decisions.

E. Consultation with civil society organizations

72. The Chairs met with civil society organizations to explore ways and means of strengthening their engagement with the treaty bodies in the course of the State party review, and to discuss the role of civil society in following up at the national level on recommendations and decisions emanating from the international human rights treaty bodies.

73. On 25 June 2015, the Chairs held a meeting with more than 80 civil society representatives from Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua and Panama.[3] Substantive concerns focused on the situation of detainees and conditions of detention, violence and discrimination against women and girls, including in relation to sexual and reproductive rights, enforced disappearances, extreme poverty, the rights of indigenous peoples and persons with disabilities and the deterioration of the general human rights situation in some countries. Several organizations requested that the treaty bodies speak out on the gravity of the human rights situation in the region.

74. Attacks against human rights defenders were identified as a major concern. In that regard, the treaty bodies were urged to take strong measures against intimidation of and reprisals against human rights defenders and those cooperating with them.

75. Some organizations expressed concern about the unwillingness of States parties to present reports to the treaty bodies, in violation of their treaty obligations. Several organizations also expressed concern over the attempts by some States to discredit the work of international human rights mechanisms and to pit treaty bodies and special procedures against one another.

76. Treaty bodies were urged to cooperate more to render the system more accessible to civil society actors.

[3] Statements made by civil society organizations are available from ohchr.org/EN/HRBodies/AnnualMeeting/Pages/MeetingChairpersons.aspx.

77. The Chairs welcomed the indispensable contribution of civil society organizations to the work of the treaty bodies, whether through submissions, inputs, hearings or briefings. They called upon civil society organizations to continue to participate in State party reviews as well as in the follow-up to recommendations emanating from the treaty bodies. It was important that civil society organizations clearly identify violations and questions that they considered most relevant for the constructive dialogue with the State party.

78. The Chairs also welcomed the various submissions by civil society organizations to the twenty-seventh meeting of Chairs, including a detailed submission prepared by 32 international and national non-governmental organizations that regularly contribute to the work of treaty bodies.[3] The organizations expressed regret that treaty bodies often failed to take into account and reference work by other treaty bodies and special procedures of the Human Rights Council. Furthermore, they called on treaty bodies to, inter alia, harmonize their follow-up procedures to concluding observations, introduce a common approach for outreach and dissemination of their concluding observations and embrace technological innovations to facilitate State party reporting and civil society participation. They also called upon treaty bodies to more systematically recommend to States parties that they establish a standing national reporting and follow-up mechanism.

F. Briefing on the global campaign for gender parity in international representation (GQUAL)

79. On 23 June 2015, the Center for Justice and International Law briefed the Chairs on a global campaign, called GQUAL, to be launched in September 2015, which aims to raise awareness about the underrepresentation of women in international bodies and calls for gender parity. The campaign is coordinated by organizations working on human rights, humanitarian law, trade and arbitration and international relations. It advocates for change in the way States nominate and elect members of international bodies. In that context, the support of the Chairs was sought for a declaration that would call for, inter alia, the establishment of guidelines and mechanisms at national and international levels that guarantee gender parity in positions involving international responsibility, including international tribunals, human rights bodies, special procedures and regional and international organizations. The Chairs requested that information regarding the campaign be made available to all treaty body members.

VI. Other matters

80. The Chairs considered it useful to have an informal meeting or other form of consultation in the course of the year, prior to the next annual meeting, to advance work on matters of concern to all treaty bodies, compare notes on the implementation of General Assembly resolution 68/268 and share good practices.

VII. Decisions and recommendations

A. General

81. The Chairs expressed their utmost gratitude to the Inter-American Institute for Human Rights and the Government of Costa Rica for their hospitality in hosting the twenty-seventh meeting of Chairs. The Chairs also expressed their sincere appreciation for the dialogue that took place at the national level with the President, the Vice-President, the Minister for Foreign Affairs and Worship, government officials, parliamentarians, the ombudswoman and civil society organizations of Costa Rica. The Chairs further thanked the Government for organizing the dialogue with the diplomatic community in San José.

82. The Chairs welcomed the call made by the Minister for Foreign Affairs and Worship of Costa Rica upon academic institutions from all over the world to reflect on innovative options to further strengthen treaty bodies. All such contributions could only widen the scope of options and deepen understanding by States of the best possible ways forward for consideration by the General Assembly of, as stated in paragraph 41 of resolution 68/268, "the state of the human rights treaty body system no later than six years from the date of adoption of the present resolution to review the effectiveness of the measures taken in order to ensure their sustainability, and, if appropriate, to decide on further action to strengthen and enhance the effective functioning of the human rights treaty body system".

83. The Chairs warmly welcomed the opportunity to meet with representatives of the Inter-American Commission of Human Rights and of the Inter-American Court on Human Rights with a view to deepening cooperation between the international and the regional protection systems for the benefit of rights-holders and contributing towards coherence in international human rights law. The Chairs encouraged individual treaty bodies to intensify cooperation with the Inter-American and other regional human rights systems, including by exploring joint statements, participation in public hearings, joint thematic reports, participation in each other's meetings, support for the ratification of each side's respective treaties and other legal instruments, the systematic exchange of documentation and information and jurisprudential dialogue.

B. Role of the Chairs in the harmonization of working methods and follow-up to General Assembly resolution 68/268

84. The Chairs reiterated the commitment of the treaty bodies to continue to develop as a system by reviewing good practices in the areas of working methods and rules of procedure.

85. The Chairs also reiterated their support for General Assembly resolution 68/268 on strengthening and enhancing the effective functioning of the treaty body system. The Chairs recalled that effective follow-up to that resolution depended on a constructive partnership among all stakeholders, working towards that common goal. In that spirit, the Chairs reiterated their

commitment to fully considering the contents of the resolution both together and within their respective treaty bodies.

86. In that context, the Chairs recalled the encouragement by the General Assembly to the treaty bodies to continue to enhance the role of the Chairs in relation to procedural matters, including with respect to formulating conclusions on issues related to working methods, generalizing good practices and methodologies among all treaty bodies, ensuring coherence across the treaty bodies and standardizing working methods.

87. Recalling the mandate of the annual meeting of Chairs, the Chairs called on all treaty bodies to facilitate the harmonization of the working methods of the treaty bodies, for the benefit of rights-holders as well as duty-bearers. In that regard, Chairs expressed support for the call made by national human rights institutions to harmonize treaty bodies' modalities of engaging with such institutions, with a view to facilitating their participation, including by those national human rights institutions that are not able to send representatives to attend treaty body sessions.

88. The Chairs recalled the decision taken at previous Chairs' meetings that the Chairs should adopt measures on working methods and procedural matters that were common across the treaty body system, and that such measures should be implemented by all treaty bodies unless a treaty body subsequently dissociated itself from them.

1. Implementation of the guidelines on the independence and impartiality of members of the human rights treaty bodies (Addis Ababa guidelines)

89. The Chairs reiterated the recommendation that States parties to human rights treaties should refrain from nominating or electing persons to the treaty bodies whose independence and impartiality is compromised by the political nature of their affiliation with the executive branch of the State. Members of treaty bodies should consequently avoid functions or activities which are, or are seen by a reasonable observer to be, incompatible with the obligations and responsibilities of independent experts under the relevant treaties. Encouraging further harmonization, the Chairs highlighted the measures put in place by different treaty bodies to ensure that all members continue to carry out their functions independently and impartially, and are also seen to do so.

2. Consultation process in the elaboration of general comments

90. General comments are an important legal tool for the effective and coherent implementation of the purpose and objectives of the international human rights treaties.

91. On the basis of existing practices and with a view to developing an aligned consultation process for the elaboration of general comments, ensuring coherence across the treaty bodies and standardizing working methods, the Chairs endorsed the following elements for the elaboration of and consultations on general comments and recommended their generalization among all treaty bodies that issue general comments:

(a) A general comment could be adopted by one treaty body or more, jointly;

(b) The decision to draft a general comment would be made in plenary;

(c) A note describing the consultation process for general comments would be shared with States parties and made publicly available for other stakeholders (national human rights institutions, civil society, academia, international organizations);

(d) Each time a treaty body initiated the drafting of a general comment, a working group composed of treaty body members or a rapporteur would be appointed and entrusted with the process of drafting the general comment;

(e) Advance versions of draft general comments would be shared with other treaty bodies and relevant special procedures mandate-holders for input, comments or feedback, with a view to strengthening the coherence of treaty law interpretation;

(f) Advance versions of draft general comments would be posted on the OHCHR website to make them accessible to States parties and a broad range of stakeholders;

(g) Input, comments or feedback received from States parties, special procedures, national human rights institutions, civil society organizations and other stakeholders would be given due consideration by the treaty body, as appropriate;

(h) The treaty body would lead the consultation process and decide on the contents and adoption of the general comment.

3. Ratification and reporting compliance by States

92. The Chairs called for the universal ratification by States of international and regional human rights treaties. The Chairs also encouraged all treaty bodies, within their respective mandates, to mark the twenty-fifth anniversary of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the fiftieth anniversary of the International Convention on the Elimination of All Forms of Racial Discrimination, with the aim to accelerate their universal ratification.

93. The Chairs welcomed the information included in the document on timely, late and non-reporting by States to the human rights treaty bodies. They also requested OHCHR to continue to make updated information on reporting compliance by States available on its website.

94. The Chairs reaffirmed the decision taken at previous meetings to include late and non-reporting by States parties as a standing item on the agenda of the annual meeting of the Chairs. In that regard, they appreciated the exchange of good practices held.

4. Intimidation and reprisals

95. The Chairs strongly condemned intimidation and reprisals against individuals or groups who engage or seek to engage with the treaty bodies. The Chairs also welcomed the strong condemnation by the General Assembly, in paragraph 8 of its resolution 68/268, of all acts of intimidation and reprisals towards individuals and groups for their contribution to the work of the treaty

bodies, and supported the call upon States by the Assembly to take all appropriate action to prevent and eliminate such human rights violations.

96. The Chairs reiterated their invitation to treaty bodies that had not yet done so to establish a rapporteur or focal point on intimidation and reprisals.

97. In order to strengthen the treaty body system's response to intimidation and reprisals against individuals or groups cooperating with the treaty bodies, the Chairs reviewed, in the light of comments provided by treaty body members, the draft guidelines on reprisals. They endorsed the guidelines against intimidation and reprisals (San José guidelines) and recommended them to their respective treaty bodies for adoption.

98. The Chairs further reaffirmed their decision, first made at their twenty-sixth meeting, to include reprisals as a standing item on the agenda of the annual meeting of the Chairs.

99. The Chairs noted the significance of the adoption of the guidelines taking place on 26 June, the International Day in Support of Victims of Torture.

5. Gender

100. The Chairs decided to pay special attention to gender representation and gender sensitivity in the organization of future Chairs' meetings. In that context, the Chairs recommended that information on the GQUAL campaign on gender parity in international bodies be shared with all treaty body members.

C. Future meetings of the Chairs of the treaty bodies

101. The Chairs reiterated their previous recommendation that the Chairs' meetings take place in New York in the years in which the biennial progress report of the Secretary-General on the implementation of General Assembly resolution 68/268 is presented, in order to maintain the dialogue with States and other stakeholders represented in New York, subject to available resources and at a time to be confirmed.

102. The Chairs decided to include the following items on the agenda of their twenty-eighth annual meeting:

(a) Follow-up by treaty bodies to General Assembly resolution 68/268;

(b) Report of the Secretary-General on progress under General Assembly resolution 68/268;

(c) Guidelines on common core documents;

(d) Reporting on compliance by States with the treaty bodies;

(e) Reporting on the implementation of the Addis Ababa guidelines;

(f) Reporting on reprisals against persons and groups cooperating with the treaty bodies and follow-up to the San José guidelines;

(g) Any other business.

103. **The Chairs recommended the holding of an informal meeting or other consultation prior to their twenty-eighth meeting to review and, if necessary, supplement the agenda.**

104. **The Chairs decided that, in accordance with the principle of rotation, the Chair of the twenty-eighth meeting of the Chairs, in 2016, will be the Chair of the Human Rights Committee and the Vice-Chair will be the Chair of the Committee on Economic, Social and Cultural Rights.**

Annex I

Joint statement of the treaty body Chairpersons on human rights and the post-2015 development agenda, 26 June 2015

The twenty-seventh meeting of Chairpersons of human rights treaty bodies, held in San José from 22 to 26 June 2015, welcomes the release of the draft of the outcome document for the United Nations summit to adopt the post-2015 development agenda.

Having previously underlined the importance of a strong universal, rights-based and participatory mechanism for follow-up, the Chairpersons welcome the commitment in the draft to a robust, effective, inclusive and transparent review framework for the implementation of the goals and accountability by States to rights-holders.

The human rights treaty bodies enjoy the legal authority to gather, receive and review information on a wide range of human rights issues in States parties. This information, which includes data from States and other stakeholders, will be an invaluable contribution to ensure reliable and validated means of measuring progress in meeting development goals for all population groups.

In defining the contours of this framework, the Chairpersons urge Member States to ensure that information gathered and acted upon by the human rights mechanisms, and in particular the human rights treaty bodies, is systematically included in the follow-up and review system of the sustainable development goals, including through the High-level Political Forum on Sustainable Development and through interaction with the proposed multi-stakeholder forums.

It is critical that the mainstreaming of human rights in the post-2015 development agenda is captured fully in the outcome of the third International Conference on Financing for Development, to be held from 13 to 16 July 2015 in Addis Ababa, in order to foster policy coherence and to ensure equitable and inclusive development that benefits all persons without discrimination.

The Chairpersons further emphasize the need for the indicators that are being developed to be based on the human rights obligations of States, including the right to development.

Finally, the Chairpersons underline the synergy between human rights, sustainable development and the environment. They recall the social responsibility of all stakeholders, including non-state actors, in this broad agenda. In this context, they look forward to the mobilization of the international community to build a strong consensus around three milestones: Addis Ababa, for financing for development; New York, for the summit to adopt the sustainable development goals; and Paris, for the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change.

Committee on Economic, Social and Cultural Rights

Committee on the Rights of Persons with Disabilities

Committee on the Elimination of Discrimination against Women

Committee on the Elimination of Racial Discrimination

Committee on Migrant Workers and Members of Their Families

Committee on the Rights of the Child

Human Rights Committee

Committee on Enforced Disappearances

Committee against Torture

Subcommittee on Prevention of Torture

Annex II

Proposals by the Chairpersons of the human rights treaty bodies to the Inter-American Commission on Human Rights

Having met with representatives of the Inter-American Commission on Human Rights in San José on 24 June 2015, the Chairpersons highlighted the need to recognize the complementarity between the international human rights treaty body system and the Inter-American human rights mechanisms in the protection and promotion of human rights standards, especially with regard to implementation at the national level.

The Chairpersons proposed the following recommendations to enhance the cooperation between the two systems:

1. Establish bilateral contacts between United Nations treaty bodies and the Inter-American Commission by appointing a focal point in every treaty body to engage with the regional system in order to facilitate the exchange of information and communication, including confidential exchanges of information on specific cases, and to exchange good practices on working methods, using technological tools to deepen cooperation.

2. Explore thematic areas for cooperation, such as women's rights, child rights, migrants, persons with disabilities, persons deprived of their liberty, racial discrimination, disappearances and reprisals.

3. Mutually promote the ratification of international and regional human rights treaties and optional protocols, as well as timely reporting by States parties to treaty bodies.

Progressive development of international law

4. Invite treaty bodies, as appropriate, to thematic hearings of the Commission to foster cross-fertilization of the development of international law. The Commission will inform relevant treaty bodies.

5. Recommend to treaty bodies that they consult the Commission in treaty body processes for the elaboration of general comments.

Individual complaint mechanisms

6. Continue the cooperation between the international human rights treaty bodies and the Commission in relation to the individual complaint mechanisms, including on issues related to jurisprudence, procedures, methods of work and the implementation of their respective decisions.

7. Mutually consider and reference respective international and Inter-American jurisprudence with a view to avoiding the fragmentation of international human rights law and maximizing the impact of decisions and recommendations.

Treaty body reporting procedure

8. Invite the Commission to submit written contributions to the treaty bodies for lists of issues (prior to reporting) and concluding observations (which can be kept for internal use only upon request).

9. Extend a standing invitation from the treaty bodies to the Commission and its secretariat to participate in treaty body sessions to increase the exchange of information and dialogue between the treaty bodies and the Commission (through in-person attendance or videoconference).

10. Invite the Commission to brief treaty bodies ahead of State party reviews.

11. Use recommendations issued by the respective mechanisms as a working tool. Explore the enhanced use of each other's instruments, policies and actions, and their implementation, when reviewing the reports of States from the region. This may include referencing each other's recommendations in concluding observations and other output whenever relevant.

Country visits

12. Encourage the Commission to provide relevant information to the treaty bodies for country visits by treaty bodies to the Americas region, including information on the human rights situation, lists of possible places to visit, discussion on strategies for visits and recommendations previously issued for possible follow-up.

Advocacy

13. Issue joint letters or statements by treaty bodies together with the Commission expressing concern over issues of relevance to more than one country or subregion, as appropriate, and, in this context, pay special attention to the serious matter of intimidation and reprisals against individuals or groups cooperating with both systems.

National human rights institutions and civil society

14. Promote the role of national human rights institutions and civil society to actively participate in the work of the international and regional systems and in the protection against reprisals for people or groups cooperating with international and regional human mechanisms.

15. Encourage strategic litigation before both human rights systems.

16. Encourage national human rights institutions and civil society to enhance their active role in monitoring the implementation of the outputs of the international treaty bodies, the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights.

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Item 73 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Torture and other cruel, inhuman or degrading treatment or punishment

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, submitted in accordance with Assembly resolution 68/156.

* A/70/150.

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Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

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In the present report, the Special Rapporteur addresses the extraterritorial application of the prohibition of torture and other ill-treatment and attendant obligations under international law. He elaborates on States' obligations to respect and ensure the right of all persons to be free from torture and ill-treatment whenever they engage in acts or breach the human rights of individuals outside their borders, and further addresses topics such as extraterritorial complicity in torture, extraordinary rendition, and a range of obligations to combat and prevent torture and other ill-treatment.

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I. Introduction

1. The present report, submitted pursuant to General Assembly resolution 68/156, is the seventeenth submitted to the Assembly by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

2. The Special Rapporteur wishes to draw attention to his most recent report submitted to the Human Rights Council (A/HRC/28/68 and Add.1-4).

II. Activities relating to the mandate

3. The Special Rapporteur conducted a country visit to Georgia from 12 to 19 March 2015.

4. On 23 April 2015, the Special Rapporteur gave expert testimony about the exclusionary rule in international law in the case of *Maldonado v. Chile* at a hearing of the Inter-American Court of Human Rights in Cartagena, Colombia, at the request of the Inter-American Commission on Human Rights.

5. On 5 May 2015, the Special Rapporteur participated in a global webinar on torture of children deprived of liberty organized by the Anti-Torture Initiative.

6. On 12 May 2015, the Special Rapporteur appeared before legislators in the parliament in Brasilia to speak on the autonomy of forensic sciences and laboratories in Brazil.

7. From 10 to 12 June 2015, the Special Rapporteur participated in the twenty-second annual meeting of special rapporteurs/representatives, independent experts and working groups of the special procedures of the Human Rights Council, in Geneva, and held bilateral meetings with members of several permanent missions.

8. On 26 June 2015, the Special Rapporteur participated in events in Washington, D.C., and, by videoconference, in Madrid to commemorate the United Nations International Day in Support of Victims of Torture.

9. On 9 July 2015, the Special Rapporteur held expert consultations on the extraterritorial application of the prohibition of torture and other ill-treatment, the focus of the present report, supported by the Anti-Torture Initiative.

10. The Special Rapporteur conducted a country visit to Brazil from 3 to 14 August 2015.

III. Prohibition of torture and other ill-treatment from an extraterritorial perspective

A. Overview

11. In the present report, the Special Rapporteur addresses the extraterritorial application of the prohibition of torture and other ill-treatment and attendant obligations in international human rights law, in particular the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Human rights norms were initially conceived to regulate not just States' behaviour vis-à-vis

persons present within their territories but also towards any persons under their jurisdiction, a concept that unequivocally covers some extraterritorial acts and situations.[1] In practice, the increasingly transnational nature of State actions entails a need to ensure that States abide by their fundamental human rights obligations when acting beyond, or when their domestic acts cause injury outside, their territorial boundaries.

12. Extraterritorial State acts[2] (or omissions) — whether lawful or unlawful — often have a significant impact on the fundamental rights of individuals outside their borders, thereby implicating States' responsibilities under international human rights law. State actions that produce significant extraterritorial effects merit analysis through the prism of international human rights law. Such actions can include cross-border military operations or use of force (A/68/382 and Corr.1); the occupation of foreign territories; anti-migration and anti-piracy operations; peacekeeping, policing or covert operations in foreign territories; the practice of detaining persons abroad; extraditions, rendition to justice and extraordinary rendition; and the exercise of de facto control or influence over non-State actors operating in foreign territories. All these scenarios can involve the commission or risk of torture or other ill-treatment as defined by the Convention, international humanitarian law, international criminal law or customary international law. Of particular concern are States' attempts to undermine the absolute legal prohibition of torture and other ill-treatment by evading or limiting responsibility for extraterritorial acts or effects by their agents that contravene their fundamental legal obligations; to narrowly interpret treaty jurisdictional provisions; and to dilute well-established obligations to ensure and fulfil positive human rights obligations whenever they exercise control or authority over an area, place, individual(s) or transaction.

13. The Special Rapporteur examines herein States' obligations to respect and ensure the right of all persons to be free from torture and ill-treatment and to comply with attendant legal obligations imposed by customary and applicable treaty law whenever they engage in acts or breach the human rights of individuals outside their borders, and to ensure a broader range of positive obligations when they are in a position to do so extraterritorially. Denying the applicability of extant legal standards to torture or other ill-treatment committed, sponsored, aided or effectively controlled or influenced by States outside their territories can create incentives for States to avoid absolute legal obligations and amount to serious breaches of international law. The Special Rapporteur considers that it is essential to ensure that there is no vacuum of human rights protection that is due to inappropriate and artificial limits on territorial jurisdiction.

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[1] In human rights treaties, the most common formulation refers to State party's "jurisdiction", which is susceptible to multiple interpretations beyond merely the State party's "territory". See, for example, the International Covenant on Civil and Political Rights. The International Court of Justice has categorically rejected the argument that human rights treaties only bind States with regard to their own territory. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70.

[2] Defined as conduct attributable to a State, either of commission or omission, performed outside sovereign borders. This includes acts performed within a State's territory that produces extraterritorial effects. See M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford, Oxford University Press, 2011).

B. Prohibition of torture and other ill-treatment and attendant obligations from an extraterritorial perspective

14. The prohibition against torture and other ill-treatment is codified in most international and regional human rights instruments and is a rule of customary international law and a *jus cogens*, or peremptory, norm of international law applying to all States.[3] The Special Rapporteur recalls that the obligation to respect the human rights of all persons applies whenever States affect the rights of individuals abroad through their acts or omissions.[4] All States parties to the International Covenant on Civil and Political Rights must respect and ensure the rights contained therein to all persons within their power or effective control outside their territories and regardless of how such power or effective control was obtained. This includes "all individuals regardless of nationality or statelessness ... who may [be] subject to the jurisdiction of the State Party".[5] This is because construing State responsibility so as to allow a State to perpetrate on the territory of another State human rights abuses that it could not perpetrate on its own territory would produce unconscionable and absurd results at odds with fundamental legal obligations.[6] The International Court of Justice recognizes that human rights obligations are unequivocally applicable in respect of acts done by States in the exercise of their jurisdiction outside their own territories.[7]

15. Under the existing universal legal regime, a State is bound to respect human rights and refrain from engaging in or contributing to a risk of torture or other ill-treatment every time that it brings a person within its jurisdiction by exercising power, control or authority over territory, persons or transactions outside its borders, regardless of the victims' nationality or the territorial locus of the action, omission or injury in question.[8]

16. There is no presumption against the extraterritorial application of human rights treaties in international law. Where a State exercises power and authority over persons outside its national territory, its obligation to respect the pertinent human rights obligations continues; this presumption can be rebutted only when the nature and content of a particular right or treaty language indicate otherwise.[9] This understanding is consistent with the evolution of human rights regimes and the displacement of the traditional international law emphasis on territorial sovereignty as a precondition for jurisdictional competence with the understanding of obligations *erga omnes partes* and the growth of specialized human rights regimes.[10]

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[3] International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, para. 99.

[4] States are "accountable for violations of rights under the [International Covenant on Civil and Political Rights] which [their] agents commit upon the territory of another State". Human Rights Committee, *López v. Uruguay*, para. 12.3.

[5] Human Rights Committee, general comment No. 31 (2004), para. 10.

[6] See Human Rights Committee, *López v. Uruguay* and *Casariego v. Uruguay*.

[7] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136.

[8] Beth Van Schaack, "The United States' position on the extraterritorial application of human rights obligations: now is the time for change", *International Law Studies*, vol. 90 (2014).

[9] Harold Hongjiu Koh, "Memorandum opinion on the geographic scope of the Convention against Torture and its application in situations of armed conflict", 21 January 2013.

[10] Theodor Meron, "The 'humanization' of public international law", *American Journal of International Law*, vol. 94, No. 2 (April 2000).

Fundamental human rights and freedoms, such as the right to be free from torture and other ill-treatment, are universally recognized, as reflected in the Vienna Declaration and Programme of Action, as "the birthright of all human beings [and] their protection and promotion [as] the first responsibility of Governments".

17. Unlike traditional, that is, prescriptive or enforcement, notions of jurisdiction, jurisdiction clauses in human rights treaties are best understood as referring to the extent of a State's factual authority or control over territory or persons. A State is responsible for violations of human rights when, in respect of the conduct alleged, the victim was brought under the effective control of, or affected by those acting on behalf of, the State. In this vein, the Inter-American Commission on Human Rights explains that findings of State responsibility turn on whether in any given circumstance the State observed the rights of a person subject to its authority and control, rather than the victim's nationality or geographical location. Often, "the exercise of [a State's] jurisdiction over acts with an extraterritorial locus will not only be consistent with, but required" by the relevant norms (*Coard and others v. United States of America*). It is indisputable that no person under the authority and control of a State, regardless of circumstances, "is devoid of legal protection for his or her fundamental and non-derogable human rights".[11]

18. The European Court of Human Rights also recognizes that States are responsible for the physical and mental integrity of persons under their authority, power or control, finding that States' responsibilities "may arise in respect of acts and events [taking place] outside [their] frontiers" and due to the acts of their agents, "whether performed within or outside national boundaries, which produce effects outside their own territory" (*Loizidou v. Turkey*; mutatis mutandis, *M v. Denmark*). Such scenarios recognized by the Court include the "exercise [of] authority and control over individuals killed in the course" of security operations by one State on the territory of another State (*Al-Skeini v. The United Kingdom*); the handover of individuals to the custody of a State's agents abroad (*Ocalan v. Turkey*); the interception and imposition of control over a ship (and persons therein) in international waters (*Jamaa and others v. Italy*); the detention of individuals in prisons operated or controlled by the State party abroad (*Al-Saadoon and Mufdhi v. The United Kingdom*); exercise of control over an area outside national territory as a consequence of military action (*Hassan v. The United Kingdom*); or the exercise of physical control over an individual, including outside formal detention facilities (*Issa and others v. Turkey*). Whenever a State exercises control over an individual extraterritorially through its agents, it must secure the substantive rights and freedoms under the Convention that are relevant to the situation of that individual (*Al-Skeini*).

19. The Special Rapporteur contends that the excessive use of force by State agents extraterritorially, resulting in loss of life or injury that meets the threshold for torture or other ill-treatment but occurs in the absence of direct physical control over an individual in the form of custody or detention, must also qualify as constituting authority and control by States (European Court of Human Rights, *Andreou v. Turkey*). It is imperative that States not be permitted to evade their fundamental obligations on the basis of a spurious distinction based on whether a State exercised direct physical control over an individual before committing the

[11] Inter-American Commission on Human Rights, decision on precautionary measures concerning persons detained by the United States in Guantanamo Bay, Cuba, 12 March 2002.

injurious act. In this context, the Special Rapporteur welcomes the judgement of the Inter-American Court of Human Rights in *Alejandre v. Cuba* finding the State responsible for the shooting down of two civilian aeroplanes flying in international airspace. He likewise welcomes the finding of the European Court in *Jaloud v. The Netherlands* that the State breached its procedural obligations to investigate the killing of Mr. Jaloud and the pronouncement that the shooting of a vehicle passing a checkpoint in Iraq constituted an exercise of jurisdiction "for the purpose of asserting authority and control over persons passing through the checkpoint".

C. Extraterritorial complicity and extraordinary rendition

20. The Special Rapporteur recognizes several potential scenarios of complicity in torture and other ill-treatment with an extraterritorial component. First, a State may acquiesce to an extraterritorial human rights violation by a second State on its territory (European Court of Human Rights, *El-Masri v. The former Yugoslav Republic of Macedonia*). Second, complicity itself can be extraterritorial, as in cases where the individual suffering a violation is located in a territory outside the complicit State's control and under the control of the principal. Examples include the alleged collusion, connivance, presence or participation of Canadian and British intelligence services in the interrogation and mistreatment abroad of Omar Khadr, Maher Arar and Binyam Mohamed.

21. Violations of the prohibition against torture or other ill-treatment — and of preventive obligations — can be committed by perpetration, omission and acts of complicity. Article 4 (1) of the Convention against Torture refers to the individual criminal liability of a person for complicity or participation in torture. The Committee against Torture considers complicity to include acts that amount to instigation, incitement, superior order and instruction, consent, acquiescence and concealment.[12] It is clear that acquiescence (art. 1 of the Convention) by State officials is sufficient for their conduct to be attributed to the State and give rise to State responsibility for torture. Article 4 (1) clearly reflects an obligation on States themselves not to be complicit in torture through the actions of their organs or persons whose acts are attributable to them (A/HRC/13/42).

22. State responsibility also derives from existing customary rules as codified in the draft articles on responsibility of States for internationally wrongful acts, which confirm that no State should aid or assist another State in the commission of an internationally wrongful act (arts. 16-18). In such cases responsibility is incurred if the former State provides aid or assistance to the latter (a) "with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State" (A/56/10 and Corr.1). Examples of assistance triggering State responsibility under article 16 include forms of assistance vital to the practice of extraordinary rendition and secret detention, including unchecked access to ports and military bases and "permissive" authorizations of the North Atlantic Treaty Organization for blanket overflight or landing rights,[13] the provision of intelligence by one State to another with the foreseeable result being the torture or ill-treatment of an individual, and financial

[12] General comment No. 2 (2008).

[13] Hans Born, Ian Leigh and Aidan Wills, eds., *International Intelligence Cooperation and Accountability* (London, Routledge, 2011).

assistance to development projects in which torture was employed in the context of displacement or implementation.[14] States should never recognize as lawful a situation created by a "serious breach" of its obligations under peremptory norms of international law and should cooperate to bring the breach to an end (arts. 40 and 41 of the draft articles). Therefore, if a State were torturing detainees, other States would have a duty to cooperate to bring the violation to an end and would be required not to give any aid or assistance to its continuation (A/67/396; A/HRC/13/42).

23. According to article 4 (1) of the Convention, interpreted in line with international criminal law jurisprudence, "complicity" contains three elements: (a) contribution by way of assistance, encouragement or support; (b) a substantial effect on the perpetration of the crime; and (c) knowledge that the help rendered assists in the perpetration of the crime.[15] Thus, individual responsibility for complicity in torture arises also in situations in which State agents do not themselves directly inflict torture or other ill-treatment but direct or allow others to do so, or acquiesce in it. In addition, orders from superiors or other public authorities cannot be invoked as a justification or excuse. Similarly, draft article 16 requires either the knowledge that the assistance is facilitating the wrongful act, or that there is an intention to do so.

24. The legal prohibition against torture and other ill-treatment would be meaningless if in practice States were able to abuse victims outside their borders with the complicity of other States, while evading responsibility on technical grounds pertaining to the territorial locus of the violations. The issues of extraterritorial complicity are particularly important in view of the extraordinary rendition and secret detention programme conducted by the United States Central Intelligence Agency after 11 September 2001, which saw States collaborate and assist one another in contravention of established international human rights standards by abducting, transferring, extrajudicially detaining and subjecting individuals to torture.[16] The obligation in article 9 of the Convention against Torture mandating that States parties "afford one another the greatest measure of assistance in connection with civil proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings" must be emphasized. This provision requires States to cooperate — in terms of providing evidence and other forms of mutual legal assistance — with criminal and civil legal proceedings involving claims of torture, rather than seek to block, otherwise hinder or ignore those proceedings. The requirement for cooperation in both criminal and civil proceedings is unsurprising, given the widely accepted recognition that a fundamental raison d'être behind the Convention was the establishment of a regime for international cooperation in the criminal prosecution of torturers based on the principle of "universal jurisdiction".[17]

25. The European Court of Human Rights, in *El-Masri*, held that a State was responsible for acts performed by foreign officials on its territory with the "acquiescence or connivance of its authorities", imputing to the former Yugoslav

[14] United Kingdom of Great Britain and Northern Ireland, High Court of Justice of England and Wales, *R. (O) v. Secretary of State for International Development* (2014).

[15] International Tribunal for the Former Yugoslavia, *Prosecutor v. Šainović and others* (2009).

[16] "European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners", 14 February 2007.

[17] United States Senate, Executive Report 101-30, 30 August 1990.

Republic of Macedonia harmful conduct that was "carried out in the presence of [its] officials" and within its jurisdiction". The Court further found that Poland had an obligation to do more than refrain from collaborating with and facilitating the Central Intelligence Agency rendition programme when it knew or ought to have known that detainees would be subject to extraordinary rendition and exposed to a risk of torture or other ill-treatment upon transfer. Even when the Polish authorities did not "know exactly or witness what was happening in the facility", they were required to take measures to ensure that individuals within their jurisdiction were not subjected to mistreatment, including harm administered by private individuals (*Abu Zubaydah v. Poland*). The State should have taken steps to "inquire into whether [the activities of the Agency] were compatible" with the international legal obligations of Poland and indeed acted to prevent the activities in question (*Al-Nashiri v. Poland*).

D. Extraterritorial applicability of the Convention against Torture and the Optional Protocol thereto

26. In its preamble, the Convention against Torture explicitly recognizes the existing absolute prohibition of torture and other ill-treatment in customary international law. While incorporating the extant norms that constitute the "common ground" upon which it is based, the Convention's provisions expressly focus on defining torture and codifying attendant deterrent and preventive obligations.[18] The Committee against Torture, in its general comment No. 2 (2008), found that article 2 in particular "undergird[ed] the Convention's absolute prohibition against torture [and] reinforce[d] th[at] peremptory *jus cogens* norm" by obliging States parties to take actions that would reinforce the extant prohibition against torture. Article 2 (2) and (3), indicating that no exceptional circumstances may ever be invoked as a justification for torture, would be absurd in the absence of an implied global ban on acts of torture and other ill-treatment, as would the Convention's aim to make "more effective the struggle against torture and other [ill-] treatment or punishment throughout the world". An analogy may be drawn with the Convention on the Prevention and Punishment of the Crime of Genocide, which places States parties under an obligation not to commit genocide even though the obligation is not expressly stated. This is because of the Convention's object and purpose to "condemn and punish genocide as a 'crime under international law'" and its underlying principles that are universally "recognized by civilized nations as binding on States, even without any conventional obligation".[19]

27. The Special Rapporteur accordingly reminds States that the *jus cogens* non-derogable prohibition against torture and ill-treatment cannot be territorially limited and that any jurisdictional references found in the Convention against Torture cannot be read to restrict or limit States' obligations to respect all individuals' rights to be free from torture and ill-treatment, anywhere in the world. This prohibition and attendant obligations — such as the obligation to investigate, prosecute and punish every act of torture and ill-treatment, to exclude evidence

[18] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford, Oxford University Press, 2008).

[19] International Court of Justice, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, para. 161.

obtained by torture and other ill-treatment from all proceedings and to refrain from enabling refoulement to torture or other ill-treatment — are norms of customary international law.[20]

E. Jurisdictional clauses in the Convention and the Optional Protocol

28. While most of the provisions of the Convention against Torture have no spatial limitation, jurisdictional clauses are found in articles 2 (1), 5 (1) (a), 5 (2), 6 (1), 7 (1), 11, 12, 13 and 16 (1). Article 4 (1) of the Optional Protocol to the Convention also contains such a clause. The Special Rapporteur finds that the Convention and the Optional Protocol limit to "any territory under [a State's] jurisdiction" or "any place under its jurisdiction and control" a small number of positive obligations, the implementation of which is necessarily dependent on the exercise of a sufficient measure of control over an individual, area, place or situation. In this sense, it is uncontroversial that the Convention obliges States to take certain positive measures only when they exercise sufficient authority to be able to do so. Even while recognizing that States' obligations to fulfil certain positive obligations are practicable only in certain situations, States' negative obligations under the Convention are not per se spatially limited or territorially defined, nor are its obligations to cooperate to end torture and other ill-treatment.

29. The Convention's drafting history reveals a preoccupation with balancing the practicability of implementing its provisions rather than an intent to limit the ability to hold States responsible for extraterritorial acts of torture or ill-treatment or to dilute the strength of its applicability. From the original phrasing of the 1978 draft by Sweden, four provisions — articles 11, (5) (1) (a), 5 (2) and 7 (1) — were in fact broadened during drafting from initial reference to "territory" to "any territory under its jurisdiction", with the initial reference to territory alone being rejected as too restrictive. In article 2 (1), the addition of "territory" to the initial reference to "jurisdiction" was intended to avoid the Convention's applicability being triggered by the nationality principle alone. There is also support for the argument that the same formulation was adopted in articles 12, 13 and 16 to ensure textual consistency.[21] That the drafting history reveals changes from references to both "jurisdiction" and "territory" alone to "any territory under its jurisdiction" can be understood to reflect practical concerns rather than a wish to limit the Convention's extraterritorial applicability. A literal reading of the Convention's jurisdictional clauses clearly contradicts its object and purpose and gives rise to impermissible loopholes in its protections.

30. The Convention's drafters explain that the clause "any territory under its jurisdiction" in article 5 (1) suggests a factual situation whereby the obligation to establish criminal jurisdiction is not limited to a State's land territory or territorial sea and airspace, but also applies to territories under military or colonial occupation and any other territories over which a State has factual control. If, for example, torture is committed on an oil rig or other installation on the continental shelf of a State party, that State "should be required to have [criminal] jurisdiction over the

[20] See, e.g., Office of the United Nations High Commissioner for Refugees, "Note on the principle of non-refoulement", 1997.

[21] Karen Da Costa, "The extraterritorial application of selected human rights treaties", *Human Rights Law Review*, vol. 14, No. 4 (2013).

offense".[22] Under the same rationale, the obligation to establish criminal jurisdiction over acts of torture committed by State agents extends also to situations of military presence or operations in a foreign country, with the consent of the local State, which are not strictly speaking governed by the rules of military occupation.

F. Positive obligations to prevent torture and other ill-treatment

31. Aside from the stated obligation to refrain from actions prohibited by international law and to respect the prohibition against torture and other ill-treatment, States also have an obligation to ensure or protect individuals' rights when they are in a position to do so by virtue of control over an area or over the persons in question. In this vein, the Human Rights Committee mandates that States are responsible for ensuring the application of the International Covenant on Civil and Political Rights in respect of acts perpetrated by actors, such as armed groups, abroad to the extent that they exercise influence amounting to "effective control over their activities" (CCPR/C/RUS/CO/7, para. 6).

32. The obligation enshrined in article 2 of the Convention, which requires States to take effective legislative, administrative, judicial and other measures to prevent torture in "any territory under [their] jurisdiction", applies to all areas and places "where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control"; furthermore, the scope of "territory" in article 2 encompasses "situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention"[23] and applies to "all persons under the effective control of its authorities, of whichever type, wherever located in the world" (CAT/C/USA/CO/2, para. 15). The Committee has clarified that this applies to all provisions expressed as applicable to territory under the State party's jurisdiction, which further apply, inter alia, to the prohibition against other ill-treatment contained in article 16.

33. The Special Rapporteur concludes that the clause "any territory under its jurisdiction" cannot be invoked to limit the applicability of the relevant obligations to territory under States parties' de jure control because such an interpretation would be contrary to the Convention's object and purpose, authoritative interpretations by the Committee, jurisprudence and common interpretations of the term "jurisdiction" under international law and would be in derogation of absolute norms of customary international law and of a *jus cogens* nature. States have international legal obligations to safeguard the rights of all individuals under their jurisdiction (A/HRC/25/60), even extraterritorially. The obligation to take preventive measures under articles 2 (1) and 16 (1) clearly encompasses action taken by States in their own jurisdictions to prevent torture or other ill-treatment extraterritorially.

34. Furthermore, the use of the phrasing "any territory under its jurisdiction" in articles 11-13 reflects a common-sense drafting choice that cannot be interpreted as intending to limit a State's obligations to take preventive measures against torture and ill-treatment when in fact it is compelled to do so by a factual situation that

[22] J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Nijhoff, 1988).

[23] Committee against Torture, general comment No. 2 (2008), para. 16.

entails the State's actual control or authority over an area, place or person outside its territory. For example, the preventive obligations enshrined in article 11 that require a systematic review of interrogation rules for custody and treatment of persons in detention cannot be interpreted as limiting States' obligations to their sovereign territories or places over which they exercise complete governmental authority (CAT/C/USA/CO/3-5). Rather, the clause denotes a particular factual situation and the obligations enshrined in the article apply by virtue of the authority or control wielded by State agents involved in the arrest, detention, imprisonment or interrogation of persons abroad, in places such as in Bagram and Abu Ghraib in Iraq and other extraterritorial detention facilities such as Central Intelligence Agency "black sites" or offshore refugee processing centres. Likewise, the obligations enshrined in articles 12 and 13 must also be triggered by virtue of a State's exercise of de jure or de facto control over a particular area, detention facility or individual. By contrast, the obligations enshrined in article 10 do not contain a spatial reference, given that their practical implementation is not contingent upon the State party's control or authority over a particular individual or area. As explained by a former mandate holder, if a soldier of State A under the command of State B in a peacekeeping operation in State C were to commit an act of torture, State A could be responsible for failure to provide appropriate training under article 10 (State B and the United Nations might also be responsible).[24]

35. International and regional jurisprudence clearly indicates that, whenever a State exercises effective control over a territory, area, place or person outside its borders, it is required not only to abstain from unlawful acts but also to ensure a broader range of positive human rights obligations. States have positive obligations to protect individuals against infringement of their rights and preventive obligations to ensure that actors over whom they have jurisdiction, including extraterritorially, do not engage in or contribute to acts of torture.[25] While clearly responsible for wrongful acts committed extraterritorially or having an extraterritorial effect, a State may also be responsible for "indirectly attributable extraterritorial wrongfulness" owing to a failure to fulfil its positive human rights obligations. In such scenarios the criterion of "effective control" may be taken into account to assess the standards of due diligence that a State is legally obliged to demonstrate in a given situation.[26]

36. The Special Rapporteur reminds States that monitoring places of deprivation of liberty is key to preventing torture and other ill-treatment. The scope of article 4 (1) of the Optional Protocol mandating visits to "any [such] place under [a State's] jurisdiction and control" must be interpreted to encompass places of deprivation of liberty outside the State's sovereign territories, including military detention facilities overseas.[27] Visits must be permitted anywhere that States have effective control over places of detention outside their territories.

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[24] Manfred Nowak, "Obligations of States to prevent and prohibit torture in an extraterritorial perspective" in Mark Gibney and Sigrun Skogly, eds., *Universal Human Rights and Extraterritorial Obligations* (Philadelphia, University of Pennsylvania Press, 2010).

[25] See, e.g., Committee on the Rights of the Child, general comment No. 16 (2013) and documents CCPR/C/DEU/CO/6, CERD/C/USA/CO/6, E/C.12/FIN/CO/6 and E/C.12/CHN/CO/2.

[26] Vassillis Tzevelekos, "Reconstructing the effective control criterion in extraterritorial human rights breaches", *Michigan Journal of International Law*, vol. 36, No. 1 (2015).

[27] Association for the Prevention of Torture, "The application of OPCAT to a State Party's places of military detention located overseas", Legal Briefing Series, October 2009.

37. The duty of States parties under article 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) to "secure" to everyone within their jurisdiction the rights and freedoms of the Convention also includes positive obligations to protect individuals against infringements by third parties, including private individuals or organs of third States operating within the State party's jurisdiction. The Convention has recognized positive obligations that flow from the prohibition of torture and inhuman treatment, including the duties to investigate and to provide for effective remedies. The Special Rapporteur agrees that "practical difficulties" encountered by States in securing the effective enjoyment of relevant rights in some extraterritorial scenarios can never displace their positive duties to guarantee and ensure these rights at all times.[28] The Special Rapporteur contends that the positive obligation of the State to protect persons within their jurisdiction from torture and ill-treatment requires the implementation of safeguards.[29] These include, but are not limited to, the right to legal assistance,[30] access to independent medical assistance (E/CN.4/2003/68), notification of detention and communication with the outside world (A/HRC/13/39/Add.3) and the right of individuals deprived of their liberty in any situation to challenge the arbitrariness or lawfulness of their detention and receive remedies without delay. Such obligations apply whenever States detain persons extraterritorially, including during international military operations, when the obligations to guarantee humane treatment and respect for detainees' physical and psychological needs, including adequate conditions of detention and protection from the dangers of military operations, remain intact (Copenhagen Principles).[31]

G. Non-refoulement and migration

38. The obligation to take measures to prevent acts of torture or other ill-treatment includes actions that a State takes in its own jurisdiction to prevent such acts in another jurisdiction. The non-refoulement principle obliges States not to expose individuals to real risks of torture or other ill-treatment by expulsion, extradition or refoulement to another State (see A/53/44 and Corr.1);[32] the individual being transferred need not cross an international border for this obligation to apply. Non-refoulement is "an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment" (A/59/324, para. 28) and a rule of customary international law. The non-refoulement prohibition is codified in article 3 of the Convention, which is not geographically limited on its face. In *Soering v. The United Kingdom*, the European Court of Human Rights found that the extraditing State would be responsible for a breach of that norm, even where the mistreatment at issue would be subsequently beyond its control. States are required to abstain from acting within their territories and spheres of control in

[28] Council of Europe, European Commission for Democracy Through Law (Venice Commission), opinion No. 363/2005, 17 March 2006.

[29] See Human Rights Committee, general comment No. 32 (1992) and General Assembly resolution 55/89.

[30] European Court of Human Rights, *Pishchalnikov v. The Russian Federation* (2009); European Committee for the Prevention of Torture, *CPT Standards* (2002).

[31] The Copenhagen Process on the Handling of Detainees in International Military Operations. Available from http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhangen%20Process%20Principles%20and%20Guidelines.pdf.

[32] See also Human Rights Committee, *Chitat Ng v. Canada*.

manners that expose individuals transferred outside their territory or control to a real risk of torture or other ill-treatment. That the prohibited acts occur outside the territory or the direct control of the State in question does not relieve that State from responsibility for its own actions vis-à-vis the incident (E/CN.4/2002/137). Refoulement may implicate extraterritorial State conduct whenever States operate and hold individuals abroad, as in the context of armed conflict or offshore detention or refugee processing facilities. Whenever States are operating extraterritorially and are in a position to transfer persons, the prohibition against non-refoulement applies in full.[33] A finding to the contrary would contravene the object and purpose of the Convention and amount to a breach of the non-derogable norms underlying the non-refoulement principle (CAT/C/CR/33/3; CAT/C/USA/CO/2). A person under the authority of State agents anywhere cannot be returned when facing risk of torture.

39. The European Court has consistently held that the absolute nature of the prohibition on torture and other ill-treatment implies a positive obligation not to send individuals to States where they face a real risk of prohibited treatment (*Saadi v. Italy*). A State's responsibility is engaged whenever its agents fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known at the time of transfer (*Abu Zubaydah v. Poland*). The Committee against Torture similarly has found that State decisions to expel or render individuals to places where they face a real risk of ill-treatment breaches the Convention (*P. E. v. France*).

40. The Committee has stressed that the procurement of diplomatic assurances cannot be used by States to escape their absolute obligation to refrain from non-refoulement (*Agiza v. Sweden*). A previous holder of the mandate has explained that diplomatic assurances are "unreliable and ineffective" in the protection against torture and other ill-treatment, with post-return monitoring mechanisms doing little to mitigate the risk of torture (A/60/316, para. 51). States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to such treatment (General Assembly resolution 60/148, para. 8).

41. The absolute prohibition against refoulement, which is aimed at protecting individuals from torture and other ill-treatment, is stronger than that found in refugee law, meaning that persons may not be returned even when they may not otherwise qualify for refugee or asylum status under article 33 of the 1951 Convention relating to the Status of Refugees or domestic law. Accordingly, non-refoulement under the Convention against Torture must be assessed independently of refugee or asylee status determinations, so as to ensure that the fundamental right to be free from torture or other ill-treatment is respected even in cases where non-refoulement under refugee law may be circumscribed.

42. The obligations enshrined in the Convention also apply to State vessels patrolling or conducting border control operations on the high seas and States' pushbacks of migrants under their jurisdiction can breach the prohibition of torture and ill-treatment and non-refoulement obligations. In the context of migration control, the Special Rapporteur has urged migration authorities to ensure that measures do not further traumatize victims; that there are alternatives to detention;

[33] Emanuela-Chiara Gillard, "There's no place like home: States' obligations in relation to transfers of persons", *International Review of the Red Cross*, vol. 90, No. 871 (September 2008).

that reception centres comply with international human rights standards; and that migrants and asylum seekers should be individually assessed, including their need for protection. This is in line with the pronouncement by the Human Rights Committee that these safeguards apply to all individuals regardless of nationality or statelessness, including asylum seekers, refugees, migrant workers and other persons in the territory or subject to the jurisdiction of the State party.

43. States' non-refoulement obligations also embrace fundamental procedural obligations and rights that cannot be bypassed.[34] First and foremost is the obligation to offer individuals a fair opportunity to make claims for refugee or asylum status, including the right not be returned to places where they risk being subjected to torture or other ill-treatment. In addition, there is the right to challenge detention and potential transfer (Committee against Torture, *Arana v. France*) on the basis of fear of mistreatment in the receiving State, which may be understood as a substantive guarantee of non-refoulement, part of the right to an effective remedy and inherent in the right to due process of law (Inter-American Court of Human Rights, *United States Interdiction of Haitians on the High Seas*). This challenge must take place prior to transfer (Human Rights Committee, *Alzery v. Sweden*), before an independent decision maker with the power to suspend the transfer during the pendency of the review and must be an individualized procedure incorporating timely notification of potential transfer and the right to appear before this independent body in person (*Agiza v. Sweden*). This inquiry is separate and independent from the determination of refugee status or grant or refusal of asylum.

H. Obligation to investigate, prosecute and punish and bring perpetrators to justice

44. The Special Rapporteur reminds States that the core purpose of the Convention against Torture was the universalization of a regime of criminal punishment for perpetrators of torture, building upon the regime already in existence under international human rights, customary international law and international humanitarian law. By its terms, the Convention provides for far-reaching extraterritorial obligations to bring perpetrators of torture to justice. Article 5 (1) obliges States to establish jurisdiction over all acts of torture on the territoriality, flag, active nationality and passive nationality principles. All States have a customary international law obligation to investigate, prosecute and punish all acts of torture and other ill-treatment as codified, inter alia, in the Convention.

45. Article 5 (1) requires States to take legislative measures to establish jurisdiction based on the territoriality, flag and active and passive nationality principles with a view to prosecuting any act of torture committed in "any territory under [the State's] jurisdiction" and to take all measures necessary to investigate the crime, arrest the alleged offender and bring him or her to justice before its domestic courts.[35] In the example provided by a former mandate holder, if an Egyptian intelligence agent on board a Central Intelligence Agency rendition aircraft registered in the United States were to torture a Jordanian citizen when flying

[34] Margaret Satterthwaite, "The legal regime governing transfer of persons in the fight against terrorism" in *Counter-Terrorism Strategies in a Fragmented International Legal Order*, L. van den Herik and N. Schrijver, eds. (Cambridge, Cambridge University Press, 2013).

[35] Nowak, "Obligations of States".

through Irish airspace, Egypt, the United States and Ireland would all be required to investigate the case and issue an arrest warrant (as would be Jordan, upon accepting the passive personality principle). In recognition of the obligation to investigate and prosecute all acts of torture, Italian courts convicted in absentia 23 United States and two Italian officials involved in the abduction and extraordinary rendition of Abu Omar to Egypt, where he was tortured.[36]

46. The Convention requires States to criminalize all acts of torture "wherever they occur, and to establish criminal jurisdiction over various extraterritorial acts of torture, including universal jurisdiction when an offender is present in 'any territory under its jurisdiction'".[37] Universal jurisdiction exists in recognition that some international norms are *erga omnes*, that is, owed to the international community as a whole. At a minimum, the domestic courts of all States have the power to prosecute under international law those responsible for crimes against humanity, war crimes (including serious violations of common article 3 of the Geneva Conventions of 12 August 1949 on the protection of victims of war), genocide and torture.

47. Article 5 (2) establishes the obligation to bring perpetrators to justice (to investigate, prosecute and punish) under the universal jurisdiction principle, requiring that each State party must take the measures necessary to establish its jurisdiction over relevant offences in cases where the alleged offender is present in "any territory under its jurisdiction" and it does not extradite him or her. The clause "any territory under its jurisdiction" clearly refers to the alleged offender's presence in any territory under the State's jurisdiction at the time of prospective apprehension, as opposed to denoting the locus of the act of torture. The latter would be an implausible, textually unfounded interpretation and would defeat the Convention's object and purpose. As explained by Danelius, discussions during the drafting process:

> Centred round the concept of so-called universal jurisdiction [and] whether each State should undertake ... to assume jurisdiction not only based on territory or the offender's nationality but also over acts of torture committed outside its territory by persons not being its nationals. The principle of universal jurisdiction — which had already been accepted in conventions against hijacking of aircraft and other terrorist acts — was eventually accepted and found its place in article 5(2).[38]

48. This universal jurisdiction is generally considered permissive. On the other hand, the rule of *aut dedere aut judicare* is clearly mandatory. This is further complemented by article 7 (1) of the Convention, which requires States to provide for universal jurisdiction over extraterritorial acts of torture whenever the forum State fails to extradite a suspect under the principle of *aut dedere aut judicare*. Article 6 (1) also unconditionally requires States to detain persons suspected of having committed torture found in their territories without limiting the act to torture committed in territories subject to the jurisdiction of the State party, or to ensure his or her presence at criminal or extradition proceedings.

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[36] Corte di Cassazione, sentenza 46340, 19 September 2012.

[37] Koh, "Memorandum opinion".

[38] Hans Danelius, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: introductory note", 2008. Available from http://legal.un.org/avl/ha/catcidtp/catcidtp.html.

49. The Committee against Torture confirmed this finding in *Guengueng and others v. Senegal*, finding that Senegal had an obligation under article 5 (2) to prosecute the former President of Chad on the basis of universal jurisdiction. The Committee found that Senegal had failed to meet its obligations under article 5 (2), rejecting the State's argument that Senegalese legislation did not provide for universal jurisdiction to prosecute presumed accomplices or perpetrators of torture "when these acts have been committed outside Senegal by foreigners". The Committee recalled that article 5 (2) obliged the State party "to adopt the necessary measures, including legislative measures, to establish its jurisdiction over the acts" in question. It further cited article 7, which put "the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the objective of the provision being to prevent any act of torture from going unpunished". The International Court of Justice, in *Questions Relating to the Obligation to Prosecute or Extradite*, similarly confirmed States' obligations under the Convention to either prosecute or extradite alleged perpetrators of torture to another State with jurisdiction for prosecution. The obligation to prosecute or extradite includes torture committed by non-State actors acting "in an official capacity", especially de facto regimes. In *R. v. Zardad*, the Central Criminal Court of England and Wales tried and convicted a member of Hezb-i-Islami in Afghanistan for conspiracy to commit torture.

50. In *R. v. Pinochet* (No. 3), the United Kingdom House of Lords approved the extradition of the former President of Chile to face torture charges in Spain, finding that the "*jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed". Offences constituting *jus cogens*, such as torture, may be punished by any State because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution".[39] It is illustrative that at least 85 States provide in their domestic law for universal jurisdiction over torture. The Special Rapporteur welcomes instances of States' exercise of universal jurisdiction to investigate international crimes such as torture, war crimes and crimes against humanity committed extraterritorially by or against non-citizens as a means to combat impunity.[40]

51. The Special Rapporteur regrets evidence that States have employed restrictive doctrines, such as State secrets and political questions doctrines,[41] in both territorial and extraterritorial contexts, in an effort to obstruct prosecution and evade responsibility (*El-Masri v. The United States*), and reminds States that competent courts in States parties to the Convention are obligated to exercise jurisdiction over acts of torture and ill-treatment, irrespective of the locus where wrongfulness took place. This obligation should also encompass situations wherein a State may be held responsible for its failure to pre-empt or remedy illicit conduct not directly attributable to it, such as when it failed to meet its due diligence obligations to prevent and protect persons from grave violations of human rights. The Supreme Court of the Netherlands recognized in the Dutch battalion case that the State was

[39] See, e.g., United States Court of Appeals, *Demjanjuk v. Petrovsky and others* (1985).

[40] Constitutional Court of South Africa, *National Commissioner of The South African Police Service v. Southern African Human Rights Litigation Centre and Another* (2014).

[41] United States federal courts will refuse to hear a case if they find that it presents a "political question".

responsible for the deaths of three men at Srebrenica, Bosnia and Herzegovina, by failing to shield the victims when they sought refuge in a Dutch compound over which the State exercised "effective control" — defined as "factual control over specific conduct" — under article 8 of the draft articles on the responsibility of States for internationally wrongful acts. The Special Rapporteur welcomes the indication that States are not simply required to abstain from causing prohibited acts but are obligated, to the extent possible, to fight wrongfulness, including through investigation and prosecution of torture.

I. Exclusionary rule

52. The exclusionary rule contained in article 15 of the Convention, mandating that States not invoke as evidence in any proceedings statements obtained as a result of torture, is not territorially limited on its face.[42] The exclusionary rule forms a part of, or is derived from, the general and absolute prohibition of torture and other ill-treatment (Human Rights Committee, general comment No. 20 (1992); Committee against Torture, *G.K. v. Switzerland*) and, as such, is not derogable under any circumstances and will apply to States that are not party to the Convention (A/HRC/25/60). The prohibition is considered a rule of customary international law that flows from the absolute nature of the prohibition of torture. Its object is to discourage and disincentivize torture by disallowing admission of "tainted" evidence and to provide for fair trials.

53. Although the exclusionary rule is not expressly listed among the rules that apply both to torture and to other ill-treatment under article 16 of the Convention, it has repeatedly been made clear that statements and confessions obtained under all forms of ill-treatment must be excluded in legal proceedings.[43] The exclusionary rule is applicable no matter where the torture or ill-treatment was perpetrated and even if the State seeking to rely on the evidence in question had no prior involvement in, or connection to, the acts of torture (CAT/C/CR/33/3). In addition, the exclusionary rule applies not only where the victim of torture or ill-treatment is the actual defendant, but also where statements by third parties allegedly obtained by torture are concerned (Committee against Torture, *Ktiti v. Morocco*). The application of this rule is not restricted to criminal proceedings but applies to all proceedings, including extradition proceedings.

54. The Committee (*P.E. v. France*; *Agiza v. Sweden*; *Pelit v. Azerbaijan*; *Dzemajl v. Yugoslavia*), the European Court of Human Rights (*Othman v. The United Kingdom*) and the African Commission on Human and Peoples' Rights (*Egyptian Initiative for Personal Rights and Interights v. Egypt*) have firmly ruled against the use of evidence obtained by torture, demonstrating that international law has declared its unequivocal opposition to the admission of such evidence. The Special Rapporteur recalls that all States have an obligation to ascertain whether statements admitted as evidence in any proceedings for which they have jurisdiction, including extradition proceedings, have been made as a result of torture (*G.K. v. Switzerland*).

[42] *A. and others v. Secretary of State for the Home Department*, United Kingdom House of Lords (2005).

[43] Committee against Torture, general comment No. 2 (2008).

J. Remedies

55. The right to a remedy is fundamental under international law[44] and must be accessible to victims irrespective of where the violation occurred or whether the State exercising jurisdiction is the perpetrator. The Convention requires States parties to ensure in their legal systems that the victims of torture obtain redress, encompassing the concept of "effective remedy", the right to which underpins the entire Convention.[45] Under customary international law a State's duty to make reparation for an injury is inseparable from its responsibility for commission of an internationally wrongful act (see A/56/10 and Corr.1) and, as such, the right to an effective remedy is applicable extraterritorially. It encompasses a right to know the truth about past events concerning the perpetration of serious international crimes, as reflected in international legal documents (E/CN.4/2005/102/Add.1)[46] and jurisprudence.[47] The United States Torture Victims Protection Act in fact provides an example of how States parties can carry out their obligations under article 14 of the Convention.

56. The Special Rapporteur notes that article 14 is not geographically limited on its face and will apply no matter where the torture takes place (CAT/C/CR/34/CAN). The Committee authoritatively states that the application of article 14 is not limited to victims who were harmed in the territory of the State party or to torture committed by or against nationals of the State party. States must provide restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition to victims of torture.[48] The understanding submitted by the United States that article 14 was limited to territory under a State's jurisdiction[49] is at odds with its legislation (Alien Tort Claims Act) and jurisprudence.[50] It has been rejected by subsequent action, such as the enactment of the Torture Victim Protection Act, and in any event indicates the otherwise comprehensive extraterritorial applicability of the article.

57. The obligation to provide an effective remedy applies "irrespective of who may ultimately be the bearer of responsibility for the violation",[51] which is essential to ensuring that all persons, including migrants and non-citizens, are afforded their fundamental rights without discrimination. States' obligations to provide redress are both substantive and procedural,[52] wherein States must establish judicial or administrative bodies capable of determining a torture victim's right to redress, awarding such redress and ensuring accessibility of these forums to victims

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[44] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, annex.

[45] Committee against Torture, general comment No. 3 (2012).

[46] See also *The Global Principles on National Security and the Right to Information (Tshwane Principles)* (New York, Open Society Foundation, 2013).

[47] Inter-American Court of Human Rights, *Ellacuría v. El Salvador* (1999); *Galdámez v. El Salvador* (2000); *Velásquez-Rodríguez v. Honduras* (1988).

[48] Basic Principles, para. 18.

[49] Message from the President transmitting the Convention against Torture to the Senate, 20 May 1988 (Sen. Treaty Doc. 100-20).

[50] See, e.g., *Filartiga v. Peña-Irala* (1980); *Samantar v. Yousuf* (2010).

[51] Basic Principles, para. 3 (c).

[52] Committee against Torture, general comment No. 2 (2008).

(A/69/277).[53] In the case of migrants, the recommended principles and guidelines on human rights at international borders developed by the Office of the United Nations High Commissioner for Human Rights[54] note States' obligation to afford remedies against removal orders where there are substantial grounds for believing that the persons removed would be at a risk of torture or other ill-treatment if "returned to, readmitted, or subject to onward return to a place where they might be at such risk" (guidelines 9), and further to ensure that torture and ill-treatment survivors are referred to proper rehabilitation services.

58. A State's failure to investigate, criminally prosecute or allow civil proceedings — or efforts to block or hinder such proceedings — relating to allegations of torture or other forms of ill-treatment constitutes de facto denial of an effective remedy.[55] The Special Rapporteur regrets that this has been the case regarding victims of rendition and other extraterritorial acts of torture and ill-treatment seeking redress from Governments[56] and reminds States that an essential component of the obligation to provide redress is the obligation not to obstruct redress[57] or obstruct access of an individual to an effective remedy, for example by invoking "State secrets" to dismiss lawsuits *in limine litis*.

59. The Special Rapporteur recognizes that some States have provided financial compensation to victims of extraordinary rendition and secret detention as part of undisclosed out-of-court settlements for complicity in torture or other ill-treatment abroad in response to civil suits.[58] The Special Rapporteur welcomes this step in the right direction but insists that strict compliance with international law requires States to provide compensation pursuant to a finding of wrongdoing through available legal mechanisms.

60. The Special Rapporteur commends efforts to legislate an exception to State immunity in civil cases for torture and other serious crimes under international law.[59] Although States do not as a matter of practice accord a civil remedy for torture committed by foreign States abroad,[60] the law may be evolving in this direction.[61] The Committee has commended the efforts of States parties to provide civil remedies for persons subjected to torture outside their territory, noting that this is particularly important when a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place and that article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access a remedy and obtain redress (CAT/C/CR/34/CAN).

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[53] This will include access to legal assistance.

[54] Available from www.ohchr.org/EN/Issues/Migration/Pages/InternationalBorders.aspx.

[55] Committee against Torture, general comment No. 3 (2012).

[56] See, e.g., for the United States, *El-Masri v. The United States* (2006); *Arar v. Ashcroft* (2009); *Mohammed v. Jeppesen* (2010).

[57] See, e.g., Inter-American Court of Human Rights, *Contreras v. El Salvador* (2011); *Rio Negro Massacres v. Guatemala* (2012).

[58] See, e.g., Prime Minister of Canada, "Letter of apology to Maher Arar and his family", 2007; United Kingdom Ministry of Justice Memorandum, "Joint Committee on Human Rights inquiry into Justice and Security Green Paper", 2011.

[59] See, inter alia, Torture Victim Protection Act of 1991, Alien Tort Statute and Foreign Sovereign Immunities Act (United States); Torture Damages Bill (2010) (United Kingdom).

[60] International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99.

[61] See, e.g., Committee against Torture, general comment No. 3; CAT/C/CR/34/CAN; Supreme Court of Italy, *Ferrini v. Federal Republic of Germany* (2004).

61. The argument that the *jus cogens* status of the prohibition of torture takes precedence over the customary right to State immunity[62] or constitutes an "implied waiver" of State immunity[63] has not been accepted by courts, which have found that the peremptory norm of prohibition against torture does not encompass a civil remedy.[64] Nevertheless, it has not been discounted that this approach may change (*Al-Adsani*). While courts have additionally discounted the argument of "last resort" (*Jurisdictional Immunities*), that is, where there is no alternative forum for a hearing, the Special Rapporteur considers that denying a torture victim access to judicial remedies is a violation of State obligations under article 14, undermining the international community's commitment to the elimination of torture.[65]

K. Extraterritoriality and the laws of armed conflict

62. Under the Convention the prohibition and prevention of torture and other ill-treatment will apply at all times, including in situations of armed conflict and concurrently with applicable norms of international humanitarian law. This is evidenced by textual aspects of the Convention that explicitly address armed conflict and military activities, according to which no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture, as well as aspects of its negotiating history (E/CN.4/1984/72). International human rights law remains applicable during armed conflict and the protection offered under human rights law does not cease during hostilities (without prejudice to the application of the *lex specialis* rule under appropriate circumstances).[66] In addition, the humane treatment requirements under the Convention and international humanitarian law are substantially equivalent, both prohibiting torture and other ill-treatment in international and non-international armed conflicts, with common article 3 of the Geneva Conventions of 12 August 1949 constituting a minimum baseline of protections applicable at all times, including during non-international armed conflicts.[67] The Special Rapporteur contends that the universal legal regime for the prohibition and prevention of torture is indeed strengthened by the intersection of multiple subsystems and specialized regimes outlawing torture and other ill-treatment. Torture constitutes a grave breach of the Geneva Conventions, a violation of common article 3 and a violation of customary international humanitarian law. Under international criminal law, torture can also constitute a crime against humanity or an act of genocide.

63. The Special Rapporteur finds that the prevention and prohibition of torture and other ill-treatment under the Convention are indeed complementary to the

[62] European Court of Human Rights, *Al-Adsani v. The United Kingdom* (Dissent) (2001); United States Court of Appeals, *Princz v. Federal Republic of Germany* (Dissent) (1995); *Ferrini*; International Tribunal for the Former Yugoslavia, *Prosecutor v. Furundzija* (1998).

[63] *Princz* (Dissent); International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), I.C.J. Reports 2002*, p. 3 (Joint Separate Opinion).

[64] *Jurisdictional Immunities*; cf. United States Supreme Court, *Sosa v. Alvarez-Machain* (2004) and United States Court of Appeals, *Filartiga v. Peña-Irala* (1980), finding that universal civil jurisdiction is available for acts of torture.

[65] Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, 2011.

[66] See, e.g., Security Council resolution 237 (1967).

[67] International Tribunal for the Former Yugoslavia, *Prosecutor v. Tadić* (1999).

prevention and prohibition of torture and other ill-treatment under international humanitarian law.[68] Torture and other forms of ill-treatment are specifically prohibited under numerous provisions of the Geneva Conventions and the Additional Protocols thereto, including regarding prisoners of war, the wounded and sick, protected civilians and persons detained in non-international armed conflicts. Perpetration of such acts will constitute a grave breach of international humanitarian law and a war crime under the Rome Statute of the International Criminal Court and will engender a right to an effective remedy.

64. In addition, obligations imposed under international humanitarian law that are more protective than those under the Convention will be accommodated under its savings clauses (arts. 1 (2) and 16 (2)), including the application of the "overall control" test (*Tadić*), rather than the "effective control" test espoused under human rights law, and the broader definition of torture wherein there is no public official requirement.[69] Notably, prohibitions against torture found in international humanitarian law and international criminal law do not necessarily require a showing of State action, indicating that non-State actors can be responsible for torture.

IV. Conclusions and recommendations

65. **The *jus cogens* non-derogable prohibition against torture and other ill-treatment cannot be territorially limited. Whenever States bring a person within their jurisdiction by exercising control or authority over an area, place, individual or transaction they are bound by their fundamental obligation not to engage in or contribute to such acts. States moreover have an obligation to protect persons from torture and other ill-treatment and to ensure a broad range of attendant human rights obligations whenever they are in a position to do so by virtue of their control or influence extraterritorially over an area, place, transaction or persons. The obligation to prevent prohibited acts includes action that States take in their own jurisdictions to prevent such acts in another jurisdiction. This includes obligations to ensure that private actors over whom they have control or influence do not engage in or contribute to torture or other ill-treatment. Violations can arise from States' direct perpetration, omissions or acts of complicity with extraterritorial components. States are obliged, to the extent possible, to fight wrongfulness and to ensure cooperation in efforts and proceedings designed to end, uncover, remedy or prosecute and punish torture and other ill-treatment.**

66. **Most provisions of the Convention against Torture are not territorially limited and extant jurisdictional references cannot be read to restrict or limit States' obligations to respect the rights of all persons, anywhere in the world, to be free from torture and ill-treatment. The reference "any territory under [a State's] jurisdiction" in the relevant clauses cannot be invoked to limit the applicability of the relevant obligations to the sovereign territory or territory**

[68] *Legal Consequences of the Construction of a Wall*; Inter-American Court of Human Rights, *Serrano-Cruz Sisters v. El Salvador* (2004).

[69] International Tribunal for the Former Yugoslavia, *Prosecutor v. Kunarac, Kovac and Vukovic* (2001).

under de jure control of States parties, or where a State party exercises control as a "governmental authority".

67. **The Special Rapporteur calls upon States to recognize that their obligations under articles 2 and 16 of the Convention to take steps to prevent torture and other ill-treatment in "any territory under [their] jurisdiction" encompass all areas in which the State exercises, in whole or in part, de jure or de facto effective control, as well as all persons under the State's effective control, and action taken in its own jurisdiction to prevent torture or other ill-treatment extraterritorially, including by third parties or organs of third States operating within the jurisdiction of the State party concerned. This includes measures taken by States in their own jurisdiction to prevent torture or other ill-treatment abroad.**

68. **The Special Rapporteur calls upon all States to implement safeguards to protect persons within their jurisdiction extraterritorially from torture and other ill-treatment. Such safeguards include, but are not limited to, the rights to independent legal and medical assistance; notification of detention and communication with the outside world; and to challenge the arbitrariness or lawfulness of detention and obtain remedies without delay.**

69. **The absolute prohibition of non-refoulement applies at all times, even when States are operating or holding individuals extraterritorially, including border control operations on the high seas. The procurement of diplomatic assurances, which are inherently unreliable and ineffective, cannot be used by States to escape the absolute obligation to refrain from refoulement. The Special Rapporteur calls upon States to assess non-refoulement under the Convention against Torture independently of refugee or asylee status determinations, so as to ensure that the fundamental right to be free from torture or other ill-treatment is respected even in cases where non-refoulement under refugee law may be circumscribed. States are required to afford individuals fundamental procedural obligations in connection with their non-refoulement obligations, including, but not limited to a fair opportunity to state claims for refugee or asylee status and the right to challenge detention and potential transfer on the basis of mistreatment in a receiving State (a) prior to transfer; (b) before an independent decision maker with the power to suspend the transfer; and (c) through an individualized procedure incorporating timely notification of potential transfer and the right to appear before this independent body in person.**

70. **All States have an international customary law obligation to investigate, prosecute and punish all acts of torture and other ill-treatment and to criminalize such acts wherever they occur. States should establish universal criminal jurisdiction over extraterritorial acts of torture. Under the principle of *aut dedere aut judicare*, States are required to prosecute alleged perpetrators of torture under their jurisdiction or to ensure their presence at criminal or extradition proceedings. The Special Rapporteur calls upon States to exercise jurisdiction over acts of torture and ill-treatment, regardless of the locus where wrongfulness took place. A State may be held responsible for its failure to pre-empt or remedy illicit conduct not directly attributable to it, such as when it fails to meet its due diligence obligations to prevent and protect persons from grave violations of human rights.**

71. **The exclusionary rule — mandating that States not invoke as evidence in any proceedings statements obtained as a result of torture — is not territorially limited, encompasses all forms of ill-treatment and is applicable no matter where the mistreatment was perpetrated. The Special Rapporteur calls upon States to ascertain whether statements admitted as evidence in any proceedings for which they have jurisdiction, including extradition proceedings, were made as a result of torture or other ill-treatment.**

72. **Victims have a fundamental right to a remedy that must be accessible regardless of where the violation occurred or whether the State exercising jurisdiction is the perpetrator State. An essential component of this obligation to provide redress is that States do not block or obstruct access to effective remedies by invoking "State secrets" or other doctrines to dismiss lawsuits *in limine litis*. The Special Rapporteur encourages States to provide civil remedies and rehabilitation for victims of foreign acts of torture or other ill-treatment and to ensure in their legal system that victims obtain redress regardless of who bears responsibility for mistreatment or where it took place.**

73. **International human rights norms prohibiting torture and ill-treatment and mandating their prevention are applicable even in wartime and operate concurrently and complementarily with applicable laws of war norms. The Special Rapporteur calls upon States to implement international humanitarian law obligations that are more protective than those under the Convention against Torture, such as the "overall control" test and the broadened definition of torture that omits the public official requirement.**